Supreme Court, U.S.
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No.

In the SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, SOUTHEAST PROPERTIES, INC., et al.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A. and Southeast Bank of West Florida; FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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125 pp

QUESTION PRESENTED

The federal common law *D'Oench* doctrine barred certain state law claims against the FDIC as receiver of failed financial institutions. Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) in 1989. In 1993, the petitioners asserted state-law claims against the FDIC as receiver of a bank that had gone into receivership in 1991. None of the claims relate to the bank's assets, and the majority of the claims arose after 1989. The claims were dismissed under the common law *D'Oench* doctrine. The question presented is:

Did FIRREA preempt the common law *D'Oench* doctrine?

PARTIES

In addition to the parties named in the caption to this proceeding, other petitioners include:

> Financial Carriers, Inc.; First City Bancorp, Inc.; First Development Corp. of Jacksonville; The First National Bank of Palm Beach, Inc.; First Pioneer Corporation; First Plus Insurance Agency, Inc.; Semco Services, Inc.; SWQ Holdings, Inc.; Southeast Acquisition Company; Southeast Credit Insurance Agency, Inc.; Southeast Merchant Banking Corporation; Southeast Venture Capital, Ltd. I; and Southeast Venture Capital, Ltd. II

The List of Parties that Rule 14.1(b) requires is identical to the listing above coupled with the listing in the caption.

LIST PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

> The parties have no subsidiaries, and Southeast Banking Corporation is the parent company of Financial Carriers, Inc.; First City Bancorp, Inc.; First Development Corp. of Jacksonville; The First National Bank of Palm Beach, Inc.; First Pioneer Corporation; First Plus Insurance Agency, Inc.; Semco Services, Inc.; SWQ Holdings, Inc.; Southeast Acquisition Company; Southeast Credit Insurance Agency, Inc.; Southeast Merchant Banking Corporation; Southeast Properties, Inc.; Southeast Venture Capital, Ltd. I; and Southeast Venture Capital, Ltd. II.

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WILLIAM A. BRANDT, JR., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, SOUTHEAST PROPERTIES, INC., et al.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A. and Southeast Bank of West Florida; FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners William A. Brandt, Jr., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, Southeast Properties, Inc.; Financial Carriers, Inc.; First City Bancorp, Inc.; First Development Corp. of Jacksonville; The First National Bank of Palm Beach, Inc.; First Pioneer Corporation; First Plus Insurance Agency, Inc.; Semco Services, Inc.; SWQ Holdings, Inc.; Southeast Acquisition Company; Southeast Credit Insurance Agency,

Inc.; Southeast Merchant Banking Corporation; Southeast Venture Capital, Ltd. I; and Southeast Venture Capital, Ltd. II respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a), the opinion of the district court (App., *infra*, 7a-8a) and the report and recommendation of the magistrate judge (App., *infra*, 9a-22a), are unreported.

JURISDICTION

The court of appeals entered its judgment on July 11, 1996 (App., *infra*, 26a-28a), and denied rehearing and rehearing en banc on September 10, 1996 (App., *infra*, 23a-25a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1821(d)(2)(A)(i) provides:

> [The Federal Deposit Insurance Company (FDIC) shall] by operation of law, succeed to * * * all rights, titles, powers, and privileges of the insured depository institution.

12 U.S.C. § 1821(d)(2)(H) provides:

> The [FDIC], as conservator or receiver, shall pay all valid obligations of the insured

depository institution in accordance with the prescriptions and limitations of this chapter.

12 U.S.C. § 1821(d)(9)(A) provides:

> [A]ny agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC].

12 U.S.C. § 1823(e)(1) provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement -
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

STATEMENT

This is the second case in less than four months to issue from the Eleventh Circuit Court of Appeals and pose the following question dividing the courts of appeals: Whether 12 U.S.C. § 1821(d) and 12 U.S.C. § 1823(e) of FIRREA[1/] preempt the common law *D'Oench*[2/] doctrine.[3/] The first case the Eleventh Circuit issued, *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317 (CA11 1996) (en banc), *petition for cert. filed*, 65 U.S.L.W. 3085 (U.S. July 17, 1996) (No. 96-106), is pending before the Court on a petition for a writ of certiorari and was the express basis for the court of appeals' ruling in this case. (App., *infra*, 4a-5a). The Eleventh Circuit's interpretation of FIRREA expressly and directly conflicts with decisions of the District of Columbia and the Eighth Circuit Courts of Appeals.[4/] The petitioners here adopt the *Motorcity* petitioners' arguments, and contend that this case presents an

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[1/] *I.e.*, The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

[2/] *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

[3/] Here, preemption would mean that the FDIC could be liable as the receiver of a failed bank for claims that do not diminish the FDIC's interest in FIRREA "assets."

[4/] *Murphy v. FDIC*, 61 F.3d 34, 40 (CA D.C. 1995); *DiVall Insured Income Fund v. Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (CA8 1995).

even clearer basis for resolving this important circuit conflict.

A. The Parties and the Dismissed Complaint

The petitioners before the Court are William A. Brandt, Jr., as Trustee of the Chapter 7 bankruptcy estate of Southeast Banking Corporation (the Corporation), and its various affiliates (collectively, the Affiliates). The respondents are the State of Florida Department of Banking and Finance, the FDIC in its corporate capacity, and the FDIC as receiver for Southeast Bank, N.A. and its sister institution, Southeast Bank of West Florida (collectively, the Bank).

Prior to its receivership on September 19, 1991, the Bank entered and breached oral and written contracts to pay the Corporation and its Affiliates for the use of artwork (App., *infra*, 58a-62a), aircraft (App., *infra*, 62a-65a), and certain parcels of realty (App., *infra*, 67a-78a).[5/] The Bank was unjustly enriched, as well, by intercompany advances by the Corporation to facilitate the Bank's operations that were reflected on its books as loans to the Bank, including monies paid to the Bank in connection with the payment of Florida intangible taxes and tax refunds paid to the Bank or its subsidiaries based on losses funded by the Corporation. (App., *infra*, 65a-66a).

[5/] The facts stated in this petition are taken from the allegations in the dismissed complaint, all of which are assumed true on review from a motion to dismiss.

B. Proceedings Below

In 1993, the petitioners filed a complaint in the district court against the FDIC as receiver. Following the transfer and consolidation of a related case, an amended complaint for damages and other equitable relief was filed. (App., *infra*, 32a-95a).

The amended complaint added several new claims for relief, and joined as additional party defendants the FDIC in its corporate capacity and the State of Florida Department of Banking. Subsequently, the FDIC filed motions to dismiss the counts of the complaint relevant to this petition.[6/] The magistrate judge to whom the matter had been referred issued a report recommending dismissal on the basis that the claims asserted were based upon agreements invalid under the common law doctrine established in *D'Oench*. (App., *infra*, 12a-17a).

The district court entered an order adopting the report in full. (App., *infra*, 7a-8a). After the court entered a final judgment pursuant to Rule 54(b) (App., *infra*, 29a-31a), Brandt, the Corporation and the Affiliates appealed, arguing that FIRREA preempted the common law *D'Oench* doctrine. (App., *infra*, 4a-5a). The Eleventh Circuit affirmed on the express basis of its recent *Motorcity* decision. (App., *infra*, 5a).

REASONS FOR GRANTING THE PETITION

The *D'Oench* doctrine, which bars certain state law claims against the FDIC in its capacity as receiver of failed

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[6/] While the complaint presented 22 counts (App. *infra*, 32a-95a), only dismissed counts VII through XV are at issue.

financial institutions, has been termed "expansive and perhaps startling in its severity." *Bowen v. FDIC*, 915 F.2d 1013, 1015 (CA5 1990). The Eleventh Circuit's decision below and in *Motorcity* expressly and squarely conflict with other circuits' holdings on the important question of whether FIRREA has preempted the federal common law arising out of *D'Oench*.

The petitioners here have reviewed the FDIC's response to the petition in *Motorcity* and can clarify without delay the reasons for review of this clear circuit conflict. The FDIC's response to the petition filed in *Motorcity* is that (a) FIRREA does not apply retroactively and the petitioners' claims in that case are based on agreements that predate FIRREA; and (b) whether FIRREA preempts *D'Oench* is irrelevant because the requirements of Section 1823(e), as incorporated into Section 1821(d), would render the *Motorcity* agreements unenforceable.[7/] Whatever merits may exist in the FDIC's retroactivity argument in *Motorcity*, they have no bearing here: the receiver was appointed after FIRREA's effective date in 1989;[8/] Brandt, the Corporation, and the Affiliates have asserted multiple claims based upon contracts entered and breached after 1989; and the FDIC has never challenged FIRREA's applicability.

[7/] The *Motorcity* petitioners suggest that *D'Oench* was preempted in 1950, when Section 1823(e) was first enacted. Since Brandt, the Corporation, and the Affiliates do not raise this argument as a basis for certiorari, the FDIC's *Motorcity* response requires no reply here.

[8/] See e.g., *FDIC v. Barton*, 96 F.3d 128, 133 (CA5 1996) ("courts must look to law in effect at time of appointment" of the receiver); *FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225 (CA10 1993).

As to the FDIC's secondary position that Section 1823(e) bars the *Motorcity* agreements, the Eleventh Circuit's decision to apply the federal common law *D'Oench* doctrine obviated analysis of the expressly defined limits of FIRREA. That decision to part company with the courts of appeals for the District of Columbia and the Eighth Circuit and the distinctions between *D'Oench* and FIRREA furnish the basis for timely certiorari review of a circuit conflict that bears directly on the resolution of recurring and important government-citizen disputes.

The Decision of the Court of Appeals Conflicts with Decisions of other Circuits and this Court.

In *Murphy*, the District of Columbia held that "the need for a body of federal common law under the rubric of *D'Oench* has now 'disappeared' * * *." 61 F.3d at 40. Similarly, in *DiVall*, the Eighth Circuit held that "[w]hen Congress enacted the comprehensive regulatory framework of FIRREA, it preempted the federal common law rules that restricted the claims and defenses which parties could raise against the FDIC. * * * [W]e hold that *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048 (1994),] removes the federal common law *D'Oench, Duhme* doctrine * * *." 69 F.3d 1398, 1402. In *Motorcity*, the Eleventh Circuit expressly "disagree[d] with the analysis of the D.C. and Eighth Circuits" in *Murphy* and *DiVall*, and found that, in enacting FIRREA, Congress did not intend "to abrogate the previously-established federal common law *D'Oench* doctrine." 83 F.3d at 1327, 1330. *Murphy* and *DiVall* reached precisely the opposite conclusion from *Motorcity* based upon their analyses of the Court's decision

in *O'Melveny & Meyers*—the Court's first consideration of FIRREA's impact on the *D'Oench* doctrine.[2/]

Relying upon the FIRREA provision that the FDIC shall "by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution," 12 U.S.C. § 1821(d)(2)(A)(i), the *O'Melveny & Meyers* defendant argued that any defense available against a failed financial institution would be available against the FDIC as that institution's receiver. 114 S.Ct. at 2054. The FDIC responded that the statute was a nonexclusive grant of rights to the FDIC as receiver, and that federal common law was available to supplement FDIC rights. The Court disagreed:

> *Inclusio unius, exclusio alterius.* It is hard to avoid the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent [institution], to work out its claims under state law, except where some provision of the extensive framework of FIRREA provides otherwise.

Ibid.

The *D'Oench* doctrine has acquired a malleable form by its very nature as a fluid fixture of federal common law. Divorced from the more predictable qualities of a statute, it is a doctrine that continues to create uncertainty for persons doing business with financial institutions. That uncertainty has been enhanced by the unresolved circuit split over the

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[2/] The Ninth and Third Circuits appear poised to deem *D'Oench* displaced, as well. See *FDIC v. O'Melveny & Meyers*, 61 F.3d 17, 18-19 (CA9 1995); and *DiMuzio v. RTC*, 68 F.3d 777, 780 n.2 (CA3 1995).

continued vitality of the federal common law *D'Oench* doctrine and its distinctions with FIRREA. Significantly, cases of this kind will recur, enforcing the need for resolution of the express conflict of decisions readily acknowledged by the Eleventh Circuit in the course of applying federal common law to supplement FIRREA's comprehensive provisions.

1. *Sections 1823(d)(9)(A) and 1823(e) do not preclude enforcing the Bank's obligations against the FDIC.*

With the abrogation of the *D'Oench* doctrine, any legal defenses to enforcement of the Bank's obligations must come from the preemptive language of Section 1823(e) incorporated through 1821(d)(9)(A): "any agreement which does not meet the requirements set forth in Section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the [FDIC]." 12 U.S.C. § 1821(d)(9)(A). Section 1823(e) states that "[n]o agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement" is in writing and fulfills other formalities the agreements alleged here do not satisfy. 12 U.S.C. § 1823(e)(1).

Section 1823(e) is not a statutory mirror-image of *D'Oench*. It was designed to be narrower in scope, and does not operate to limit or avoid any of the obligations asserted against the FDIC in this case. These obligations neither relate to an "asset" acquired by the FDIC, as required by

Section 1823(e)(1),[10] nor involve a traditional banking transaction that would be considered by a "loan committee", as expressly contemplated by Section 1823(e)(1)(C). Recent decisions have made increasingly clear that Section 1823(e) does not apply to "ordinary liabilities" of a bank unrelated to typical banking transactions.

2. *Section 1823(e) is facially inapplicable because the Bank's obligations do not relate to any asset the FDIC acquired.*

By its terms, Section 1823(e) applies only to an "asset" acquired by the FDIC as receiver. Without identifying any particular or specific asset to which the alleged obligations related, the district court concluded that the alleged liabilities affected the overall value of the receivership estate. In its affirmance via the vehicle of *Motorcity*, the circuit court approved this flawed reasoning.

Section 1823(e) bars any "agreement which tends to diminish or defeat the interest of the [FDIC] *in any asset acquired by it* * * *." 12 U.S.C. § 1823(e)(1) (emphasis added). The term "asset" does not mean the general institution in receivership, but refers to specific assets

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[10] *Langley v. FDIC*, 484 U.S. 86, 93 (1987) (language in Section 1823(e) only allowing agreements that do not "'tend[] to diminish or defeat the right, title or interest' of the FDIC *in the asset*" is a Section 1823(e) "requirement") (emphasis added); *see also Murphy*, 61 F.3d at 38 (asset language is incorporated into Section 1821(d)(9)(A) and qualifies requirements of Section 1823(e)).

previously owned by that institution.[11/] See *Murphy*, 61 F.3d at 37 (Section 1823(e) applicable only where FDIC can point to specific asset that would be diminished by reason of claims asserted against receiver); *E.I. du Pont de Nemours & Company v. FDIC*, 32 F.3d 592 (CA D.C. 1994) (Section 1823(e) inapplicable to claims arising out of failed bank's administration of escrow agreement because claims do not relate to any "asset" acquired by FDIC); *Thigpen v. Sparks*, 983 F.2d 644 (CA5 1993) (Section 1823(e) inapplicable to claim arising from failed bank's sale of asset in non-banking transaction); *FDIC v. Merchants Nat'l Bank*, 725 F.2d 634, 639 (CA11 1984), *cert. denied*, 469 U.S. 829 (1984) (Section 1823(e) inapplicable where no assets are acquired by FDIC or assets acquired are invalidated by act independent of any understanding or side agreement); *Cote d'Azur Homeowners Association v. Venture Corp.*, 846 F. Supp. 827, 836 (N.D. Cal. 1994) (Section 1823(e) did not bar enforcement of joint venture agreement "since the agreement [did] not diminish the RTC's interest in a particular asset").

The relevant counts of the complaint do not relate to ordinary banking transactions but to such FDIC liabilities as rent due in connection with the Bank's use of real and personal property, and reimbursement of funds advanced to facilitate the Bank's daily operations and to pay taxes. Since all of these claims relate to the assets of the Corporation and its Affiliates, and not to any "assets" acquired by the FDIC from the Bank, Section 1823(e) does not apply to these counts.

[11/] The statute requires as one of its four pre-conditions to validity that the agreement be executed by the depository institution "contemporaneously with the acquisition of the *asset*." 12 U.S.C. § 1823(e)(1)(B) (emphasis added).

The District of Columbia's recent decision in *Murphy*, interpreting the Court's holding in *O'Melveny & Meyers*, illustrates this point. In *Murphy*, the court considered a real estate investor's tort and contract claims against the FDIC as receiver, based on the theory that the failed bank "effectively controlled" the venture and was responsible for his losses. Noting the absence of any written agreement to support this joint venture theory of liability, the district court granted summary judgment for the FDIC. The circuit court reversed, concluding that the FDIC had failed to "point to an interest in any specific asset of any type that would be diminished by [the investor's] claims." 61 F.3d at 37. The court also concluded that a diminution in the overall value of the receivership caused by successful pursuit of the claims was insufficient under Section 1823(e):

> To be sure, [the investor's] claims, if successful, would diminish the value of the bank in the hands of the FDIC but that . . . is not sufficient to meet the "asset" requirement of § 1823(e).

Ibid.

The Seventh Circuit's decision in *John v. RTC*, 39 F.3d 773 (CA7 1994), is also on point. The plaintiffs alleged fraud by a failed bank in selling them a home with a construction defect. The trial court granted summary judgment to the RTC under *D'Oench* and 12 U.S.C. § 1823(e). The Seventh Circuit reversed, holding that "Section 1823(e) requires an identifiable 'asset' which is acquired by the bank and then transferred to the regulatory agency, and to which the unenforceable agreements must relate." 39 F.3d at 776. Since the bank had not financed the sale, and thus had not acquired any "asset" from the

plaintiffs such as a promissory note or mortgage, the court held Section 1823(e) did not apply.[12/]

3. *Section 1823(e) does not apply to ordinary non-banking business transactions.*

The plain language of Section 1823(e) also indicates that the statute was not intended to apply to ordinary commercial liabilities of a failed banking institution, such as those alleged in this case. The district court mistakenly reasoned that the claims alleged were barred because they arose from transactions "used to facilitate the daily operations of the bank, or directly related to the maintenance of the bank's physical plant." (App., *infra*, 16a).

The district court's analysis is erroneous because Section 1823(e) applies *only* to bar claims and defenses arising from ordinary *banking transactions*—like loans, mortgages and letters of credit. The first paragraph of Section 1823(e) unmistakably reveals its limited application to banking transactions:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as *security for a loan or by purchase* or as receiver of any insured depository institution, shall be valid against the [FDIC] * * *.

[12/] *D'Oench*, too, was held not to apply as the Seventh Circuit found inconceivable that any policies invigorating the doctrine could plausibly fit the simple home-purchase transaction at issue. *John*, 39 F.3d at 777-79.

12 U.S.C. § 1823(e) (emphasis added). In addition to clarifying that the agreement must relate to an "asset" acquired or purchased by the FDIC, this section also applies particularly to assets that are provided as "security for a loan." As the relevant claims neither relate to assets acquired or purchased by the FDIC, nor to security for any of the Bank's loans, Section 1823(e) has no application to the dismissed counts.

Other provisions of Section 1823(e) further evidence that it only applies to traditional loan transactions: Section 1823(e)(1)(C) provides that in order to be enforceable, an agreement subject to the statute must have been "approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee." 12 U.S.C. § 1823(e)(1)(C). The reference to "loan committee" clearly indicates that Congress intended the statute to apply to ordinary banking transactions and extensions of credit that would customarily be brought to committee.

Courts have repeatedly recognized the absurdity of requiring that ordinary *non-banking* commercial obligations be approved by a bank's loan committee or board of directors. As the court noted in *Murphy*, any such judicial expansion of the statute would render all ordinary commercial liabilities unenforceable against the FDIC as a matter of law: "An agreement that does not involve an extension of credit would not ordinarily be submitted to the * * * loan committee for approval." 61 F.3d at 37. Indeed, "it would be positively wanton" for a court to construe the requirements of § 1823(e) as applying to defeat these otherwise valid non-banking claims. *Ibid.*; *accord In re NBW Commercial Paper Litigation*, 826 F. Supp. 1448, 1463 (CA D.C. 1992).

The Fifth Circuit reached the same result in *Thigpen v. Sparks*, holding that Section 1823(e) does not apply to a claim arising from a bank's sale of an asset in a non-banking transaction: "[T]he gist of the dispute [was] neither a loan transaction, actual or contemplated, between a borrower and lender nor a conventional banking transaction of any kind * * *." 983 F.2d at 647. Rejecting an overbroad interpretation of Sections 1823(e) and 1821(d)(9)(A), the court graphically warned against transforming those statutes from provisions "protecting the failed bank's loan portfolio from *D'Oench*-like secret agreements into a meat-axe for avoiding debts incurred in the ordinary course of business." *Id.* at 649. The court explained that "[s]uch requirements would render unenforceable the claims of nearly all bank trade creditors." *Ibid.*; *accord John v. RTC*, 39 F.3d at 776 ("the only sensible reading of § 1821(d)(9)(A) must limit its scope to the loan-related transactions covered by § 1823(e)"; otherwise, "[t]rade creditors could only enforce agreements with the bank against the RTC if the bank's board of directors had approved and recorded the deals.")

These decisions reflect a wave of legal authority that had already limited FIRREA to customary *banking* transactions and excluded ordinary *commercial* obligations from its scope, before the Court's decision in *O'Melveny*. The reasoning underlying all of the recent decisions concerning the distinction between banking and non-banking transactions applies with equal force here. The relevant counts center upon the Bank's failure to repay intercompany advances from the Corporation, and its breach of various contracts relating to the use of real and personal property. None of these transactions falls within the ambit of "regular," "traditional" or "ordinary" *banking* transactions; rather, they can only reasonably be characterized as ordinary commercial liabilities incurred in connection with everyday

business operations. The Eleventh Circuit's decision that *D'Oench* voids commercial liabilities of the FDIC receiver bestows a further credential of necessity for review of this conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1996

APPENDIX

No.

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, SOUTHEAST PROPERTIES, INC., et al.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A. and Southeast Bank of West Florida; FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-4324
Non-Argument Calendar

D.C. Docket No. 93-0563-CIV-HURLEY

WILLIAM A. BRANDT, JR., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation,

SOUTHEAST PROPERTIES, INC.,

FINANCIAL CARRIERS, INC.,

ALL OTHER ENTITIES DESCRIBED IN EXHIBIT "A" ATTACHED HERETO, FIRST CITY BANCORP, INC., FIRST DEVELOPMENT CORP. OF JACKSONVILLE, THE FIRST NATIONAL BANK OF PALM BEACH, INC., FIRST PIONEER CORPORATION, FIRST PLUS INSURANCE AGENCY, INC., SEMCO SERVICES, INC., SWQ HOLDINGS, INC., SOUTHEAST ACQUISITION COMPANY, SOUTHEAST CREDIT INSURANCE AGENCY, INC., SOUTHEAST MERCHANT BANKING

CORPORATION, SOUTHEAST VENTURE CAPITAL, LTD., I, SOUTHEAST VENTURE CAPITAL, LTD., II,

Plaintiffs-Appellants,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 11, 1996)

Before DUBINA, BLACK, and CARNES, Circuit Judges.

CARNES, Circuit Judge:

William A. Brandt, Jr., as Trustee of the Chapter 7 bankruptcy estate of Southeast Banking Corporation ("SEBC"), and various affiliates of SEBC, brought this lawsuit against the Federal Deposit Insurance Corporation ("FDIC") as receiver for Southeast Bank, N.A. ("SEBNA"), and SEBNA's sister bank, Southeast Bank of West Florida ("SEBWF").[1] The complaint contained twenty-two counts,

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[1] Originally, two complaints against the FDIC as receiver for the two sister institutions were brought separately, but they were consolidated. When they were consolidated, the plaintiffs added several (continued...)

and combined the claims asserted against SEBNA with the claims asserted against SEBWF.

The district court granted the FDIC's motion to dismiss Counts VII through XVIII and certified that judgment pursuant to Federal Rule of Civil Procedure 54(b). The plaintiffs appeal from that judgment; they do not, however, appeal the dismissal of Counts XVII and XVIII.[2/]

[1/](...continued)
new claims for relief, and joined as additional defendants the FDIC in its corporate capacity and the State of Florida Department of Banking.

[2/] The FDIC has moved to dismiss this appeal for lack of jurisdiction, contending that the district court's order was not properly certifiable under Rule 54(b). As an essential part of that argument, the FDIC contends that the district court inadvertently dismissed too many claims against the FDIC. The FDIC asserts it "did not request dismissal of the breach of written contract claims" and argues that those claims, which were presented in the same counts as breach of *oral* contract claims, should remain outstanding in the district court.

If those breach of written contract claims did remain outstanding, Rule 54(b) certification would not be proper, and we would not have jurisdiction over this appeal. In re Southeast Banking Corp., 69 F.3d 1539, 1545 (11th Cir. 1995). It seems that the FDIC would prefer that result so that this appeal would be delayed until the conclusion of all of the related litigation in the district court.

However, we deny the FDIC's motion to dismiss this appeal. Whether advertently or inadvertently, the district court did dismiss the breach of written contract claims against the FDIC; that is clear. Moreover, regardless of whether it should do so in a particular circumstance, a district court has the authority and power to dismiss a claim even if the defendant does not move for dismissal of it. Therefore, Rule 54(b) certification was proper under Rule 54(b) "final judgment" analysis, which is the first prong of Rule 54(b) analysis. As to the second prong of the inquiry under the rule--whether there is any just reason for (continued...)

I. COUNTS VII THROUGH XV

The plaintiffs argue that in dismissing Counts VII through XV of their complaint, the district court erroneously relied upon the federal common law rule of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). They contend that the D'Oench doctrine has been completely preempted by the adoption of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. §1823(e).

The plaintiffs argument has been foreclosed by this Court's recent decision in Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A., No. 93-4634 (11th Cir. May 8, 1996) (en banc), in which we held that "neither FIRREA, nor the Federal Deposit Insurance Act of 1059, preempted the federal common law D'Oench doctrine." See also Bufman Organization v. FDIC, No. 93-5[illegible] (11th Cir. May 13, 1996). The district court's dismissal of Counts VII through XV was not error.

II. COUNT XVI

Shortly after SEBNA and SEBWF were declared insolvent, they terminated certain of their employees,

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[2/](...continued)
delay--we accord the district court's determination considerable deference. In re Southeast Banking Corp., 69 F.3d at 1546 ("We will not disturb the district court's assessment that there is 'no just reason for delay' unless the court's conclusion was clearly unreasonable, because the task of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case." (quotation marks and citation omitted)). The district court's conclusion was not clearly unreasonable; Rule 54(b) certification was proper. We have jurisdiction over this appeal.

officers, and directors. Some of those individuals thereafter asserted claims against SEBC for severance benefits and other related obligations resulting from their termination.[3/] The Trustee, in Count XVI of the plaintiffs' complaint, sought reimbursement for any amounts that SEBC is ultimately required to pay on those claims. The district court dismissed that Count as failing to state a claim. It held that the Trustee has no right to recover from the FDIC based on potential severance claims, because those claims had not yet accrued at the time the FDIC was appointed receiver.

In our recent decision in McMillian v. FDIC, 81 F.2d 1041 (11th Cir. 1996), we squarely addressed this very issue, saying:

> The contract rights which gave rise to McMillian's claim [for severance benefits] were created before the FDIC was appointed receiver. The fact that these rights were contingent at that time is of no moment. The employees had a right to severance pay as of the date of the appointment--albeit a contingent one--and that right should be treated essentially the same as the right to accrued vacation pay or health benefits.

Id. at 1050 (quotation marks and citation omitted). The arguments raised to the contrary are thus foreclosed. The district court's pre-McMillian order dismissing Count XVI is due to be reversed.

[3/] SEBC had guaranteed any obligations of SEBNA and SEBWF to these individuals.

III. CONCLUSION

The FDIC's motion to dismiss this appeal is DENIED. The judgment of the district court dismissing Counts VII through XV, and Counts XVII and XVIII is AFFIRMED. Its judgment dismissing Count XVI is REVERSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-0563-CIV-HURLEY

WILLIAM A. BRANDT, et.al.,

Plaintiffs,

vs.

FEDERAL DEPOSIT INSURANCE CORP., and STATE OF FLORIDA DEPT. OF BANKING & FINANCE,

Defendants.

_____/

ORDER UPON REPORT AND
RECOMMENDATIONS OF MAGISTRATE JUDGE

This matter comes before the court upon plaintiffs' objections to the Report and Recommendations of Magistrate Judge Barry L. Garber, dated November 7, 1994, issued upon defendants' motions to dismiss (DE 33-1 and DE 35-1.) Upon review of that report, plaintiffs' objections, and de novo consideration of the underlying motion, this court agrees with the conclusions and reasoning of the Magistrate Judge as set out in his report. Accordingly, it is hereby

ORDERED and **ADJUDGED** as follows:

1) The Report and Recommendations of the Magistrate, dated November 7, 1994, are **ADOPTED** in full.

2) Defendants' motions to dismiss (DE 33-1 and 35-1) are **GRANTED**.

3) Counts VII - XVIII of the consolidated complaint are **DISMISSED**.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 16th day of December, 1994.

/s/ Daniel T. K. Hurley
Daniel T. K. Hurley
United States District Judge

Copies furnished to:
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ANN MCCORMICK, ESQ., TED CARTER, III, ESQ., U.S. Dept. of Justice, P.O. Box 875, Ben Franklin Station, Washington, DC 20044.
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ALBERT T. GIMBEL, ESQ., Dept. of Banking & Finance, The Capitol, Ste. 1302, Tallahassee, FL 32399-0350.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 93-563-CV-HURLEY
MAGISTRATE JUDGE GARBER

WILLIAM BRANDT, JR.,
SOUTHEAST PROPERTIES, INC.,
FINANCIAL CARRIERS, INC.,
et al,

Plaintiffs,

vs.

FEDERAL DEPOSIT INSURANCE
CORPORATION, et al,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court pursuant to an Order of Reference entered on January 10, 1994. (D.E. 40).[1/] The following Report and Recommendation is hereby submitted on Defendants' Motion to Dismiss Certain Counts

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1/ Although the Order of Referral makes reference to Defendant's Motion to Dismiss in Case No. 93-1683 and in Case No. 93-563, the cases have since been consolidated for all purposes under Case No. 93-563. (D.E. 44). The two Motions to Dismiss are virtually identical, the only difference being the manner in which the counts are numbered. Accordingly, this Report and Recommendation provides a single response to Defendants' Motions to Dismiss the two actions separately.

of Plaintiffs' Complaint for Failure to State a Claim upon which Relief can be Granted. (D.E. 33,35).

BACKGROUND

The current motion arises from a suit by William A. Brandt, Jr. ("Trustee") as Chapter 7 trustee of the Estate of Southeast Banking Corporation ("SEBC"), Southeast Properties, Inc. ("SEPI"), and Financial Carriers, Inc., and others, against the Federal Depository Insurance Corporation as receiver of Southeast Bank, N.A. ("SEBNA" or "the Bank"), and Southeast Bank of Florida ("SEBWF").[2/]

On December 30, 1991, the Trustee filed various proofs of claim against the SEBNA receivership estate, which were later amended and supplemented. (D.E. 1,21,62). Pursuant to 12 U.S.C. Sec. 1821(d)(5)(A)(i), the FDIC had 180 days from the date the Trustee filed his proofs of claim within which to allow or disallow the claims. The period was subsequently enlarged by a series of extensions agreed upon by the parties. The FDIC failed to make a determination by the time contracted and the instant action for damages and declaratory relief followed.

The complaint was amended for the second time on March 23, 1994 ("third complaint") and seeks relief on 22 counts.[3/] Defendants have sought to dismiss 12 of those

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[2/] Southeast Bank, N.A., is a subsidiary of SEBC.

[3/] With the exception of Counts I,II, and III, the third complaint is essentially identical to the second complaint filed on Sept. 22, 1993. Therefore, the FDIC's Motion to Dismiss, which was filed in response to the second complaint, remains effective as to the counts addressed therein by consent of the parties and this Court.

counts for failure to state a claim upon which relief can be granted.[4/]

Defendants seek to dismiss Counts VII, VIII, IX, X, XII, XIII, XIV, XV of the complaint on the ground that the claims are premised on unwritten, unrecorded obligations related to the certain personal and real property allegedly owned or leased by Plaintiffs and, consequently, cannot serve as the basis for claims against the FDIC receivership.[5/]

Defendants seek to dismiss Count XI of the complaint on the ground that the claim is premised on an unwritten, unrecorded obligation related to recovery of moneys owed SEBC and, consequently, cannot serve as the basis for a claim against the FDIC receivership.

Defendants seek to dismiss of Count XVI, XVII and XVIII on four grounds. First, the claims allege a right to indemnification, contribution and reimbursement for losses Plaintiffs may incur as a result of the potential claims of former employees, officers, directors, and third parties that are based on unwritten, unrecorded obligations. Second, the claims fail to establish sufficient standing. Third, the claims were not fixed, due and owing at the time of the banks insolvency. Finally, the claims fail to plead the elements necessary to hold one corporation liable for the acts of another.

4/ Counts herein are numbered as they appear on the third amended complaint.

5/ As to Counts VIII, X, XII, XIV, Defendants request that this Court only dismiss those portions which are premised on the existence of an oral contract.

DISCUSSION

I. Standard of Review

In evaluating a motion to dismiss, all facts alleged in the complaint must be accepted as true. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

II. Defendants' Motion to Dismiss Counts VII-XV

In the seminal case, of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942), the Supreme Court first enunciated the principle ("D'Oench Doctrine") that a private party who enters into an oral, secret, or otherwise undocumented agreement with an insured bank cannot sustain a claim against the FDIC on the basis of such a "secret scheme or arrangement." Id. at 460. See also Baumann v. Sav. Fed. Savings and Loan Ass'n, 934 F.2d 1506 (11th Cir. 1991).[6/]

[6/] D'Oench has been codified at 12 U.S.C. Sec. 1823(e), which provides in pertinent part:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either a security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement-
> (1) is in writing,

(continued...)

The policy driving the doctrine is threefold. First, D'Oench allows federal and state bank examiners to rely on a bank's records in evaluating the worth of a bank's assets. See Langley v. FDIC, 484 U.S. 86, 91 (1987). Scrupulous record keeping is mandated because bank examiners must reliably evaluate the worth of a banks assets "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in

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[9](...continued)

> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obliger, contemporaneously with the acquisition of the asset by the depository institution,
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
> (4) was, continuously, from the lime of its execution, an official record or the depository institution.

Section 1823(e) was amended by Sec. 217(4) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); Pub. L. 101-73, which added the language "or receiver of any insured depository institution." Following the amendment, Section 1823(e) applied to the FDIC in its receiver capacity as well as its corporate capacity. FIRREA also expanded the situations in which the protection under Section 1823(e) would be available. Section 1821(d)(9)(A) now provides:

> Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver of the corporation.

Both parties concede that D'Oench and the above cited statutes are applicable in the instant case.

banking services." Gunter v. Hutcherson, 674 F.2d 862, 865 (11th Cir. 1982).

Second, D'Oench favors the interests of Creditors and depositors of a failed bank who cannot protect themselves over the interests of borrowers who can memorialize all agreements in writing. In re Century Ctr. Partners, 969 F.2d 835, 839 (9th Cir. 1992).

Third, D'Oench provides an incentive to bank officials to give mature consideration to unusual lending agreements in order to prevent fraudulent transactions. Langley v. FDIC, 484 U.S. 86, 91 (1987).

As argued by plaintiffs, however, D'Oench and it's statutory counterparts are not limitless in scope. A series of recent cases have demonstrated a willingness to immunize certain transactions from D'Oench's reach. This Circuit has held that "D'Oench does not operate to bar free standing tort claims. . . not related to a specific asset acquired by the FDIC." See Vernon v. FDIC, 907 F.2d 1101 (11th Cir. 1990); Jones v. Resolution Trust Corp., 7 F.3d 1006 (11th Cir. 1993); but see OPS Shopping Center, INC. v. FDIC, 992 F.2d 306 (11th Cir. 1993) (expressly declining to extend Vernon to encompass tort claims which relate directly to "regular banking transactions" or "specific assets" of the FDIC). The exception is logical because:

> no one is likely to memorialize an agreement or intention to commit a tort. Nor does the commission of a tort haves any bearing on the validity of an institution's assets as recorded such that the bank examiners are likely to be misled, the issue that concerned the Supreme Court in D'Oench.

Id. at 1015.

As discussed by Plaintiff, the Fifth Circuit has recently broadened Vernon and OPS to suggest a rule that would "penetrate D'Oench's shield" not only for free-standing tort claims unrelated to specific bank assets, but for all disputes arising from transactions not in the ordinary course of banking business. Alexandria Ass'n v. Mitchell Co., 2 F.3d 598 (5th Cir. 1993); Thigpen v. Sparks, 983 F.2d 644 (5th Cir. 1993). See also Lesal Interiors, Inc. v. Resolution Trust Corp., 834 F. Supp. 721, 731 n.7 (D.N.J. 1993).

For example, in Thigpen, the Fifth Circuit held that Section 1823(e) of the Code was inapplicable in a warranty action arising from the bank's sale of an asset (a trust company) in a nonbanking transaction. 983 F.2d. at 644.

In Alexandria, the court extended the Thigpen holding to the common law D'Oench doctrine in a case involving the commercial sale of partnership interests in a real estate development venture by a third generation subsidiary of a failed institution.[7/] The court reasoned:

> [w]e seriously question whether a third party involved in a nonbanking transaction . . .

7/ In Alexandria, the court credited the Eleventh Circuit's decision in OPS as support for its distinctions between claims based on whether they are predicated on banking or non-banking transactions. Alexandria, 2 F.3d at 602. However, Plaintiffs' reading of OPS as "carv[ing] an exclusion from D'Oench's extensive tentacles for [all] transactions that would not be found by the FDIC during its examination of the records of regular banking transactions" is overly broad. (D.E. 45 at 10). Rather, the distinction made in OPS referred exclusively to torts that arise in the ordinary course of business as opposed to torts that are freestanding.

> would be in a better position than depositors or creditors of that bank to protect themselves by mandating board consideration and recordation in the bank's minutes. Commercial expectations simply do not include the belief that every agreement with a bank . . .must be scrutinized, approved, and recorded by the bank's executive committee or board. Alexandria, 2 F.3d at 603.

In the instant case (Counts VII-X, XII-XV) Plaintiffs seek restitution to prevent unjust enrichment and money damages to compensate for the Defendants alleged use and possession of certain artwork, aircraft, and real estate. In Count XI, Plaintiffs seek restitution for intercompany advances allegedly due and owing. All of the assets and moneys, however, were used to facilitate the daily operations of the bank, or directly related to the maintenance of the bank's physical plant. The cost of these expenditures was significant.[8/] These represent precisely the kinds of "ordinary" liabilities that are of interest to bank examiners in evaluating the fiscal soundness of a bank. Accordingly, even if this Court were to embrace the Fifth Circuit's reasoning that D'Oench contains an exception for non-banking transactions outside the tort arena, Plaintiffs still would not prevail.[9/]

[8/] For example, the complaint assesses the rental value of the artwork at $ 50,770.66 per month, plus sales tax.

[9/] Moreover, in a recent case, Robinowitz v. Gibraltar Sav., 23 F.3d 951 (5th Cir. 1994), published after the instant pleadings there submitted, the Fifth Circuit expressed caution and declined to extend Alexandria to a case in which a borrower claimed that misrepresentations by a failed bank induced him to enter into a disadvantageous settlement (continued...)

In addition, while all of the cases cited by Plaintiffs concern the ordinary creditor, e.g., "a claimant who furnished office supplies to the failed bank," Thigpen, 983 F.2d at 649, the instant case involves transactions between a parent company and its corporate affiliates. Such insider dealings are precisely the type prohibited by D'Oench and its statutory counterparts.[10/]

Finally, it would frustrate the policy of the D'Oench Doctrine to fail to apply it here. Assuming the truth of Plaintiffs' allegations, Defendants were able to acquire, use and otherwise retain a benefit of various corporate assets belonging to Plaintiffs. Plaintiffs at no time required a written agreement reflecting their right, if any, to compensation despite the fact that any obligation to compensate plaintiffs would necessarily, diminish the assets of the affiliate bank. Consequently, Plaintiffs facilitated "a scheme or arrangement whereby the banking authority. . . was or was likely to be misled" thus making this case an appropriate one for the application of the D'oench Doctrine. D'Oench, 315 U.S. at 460.

[9/](...continued)
agreement. The Court held that even though the transaction at issue was not ordinary banking business, the primary relationship between the parties was that of lender and borrower, putting the transaction outside the scope of the Alexandria exception.

[10/] Moreover, as noted by Defendants, Congress, recognizing the potential for abuse in this area, closely regulates the relationship between banking affiliates. See 12 U.S.C. Sec. 161(a) (requiring banks to report to the Comptroller of Currency the resources and liabilities of the banking association as of the close of business on any specific day); 12 U.S.C. Sec. 161(c) (mandating certain disclosures to enable the Comptroller to monitor the effect of such relations upon the affairs of the bank).

III. Defendants' Motion to Dismiss Counts XVI-XVIII

The second part of Defendants' Motion to Dismiss addresses contingent and potential claims raised by Plaintiffs.

Near the time that the FDIC was appointed Receiver of SEBNA and SEBWF, SEBNA and SEBWF terminated certain of their employees, officers, and directors. Some of these individuals have now asserted claims against SEBC for severance benefits and other related obligations resultant from their termination. Additional suits are expected in the future.[11/] Plaintiffs, in Count XVI of the instant complaint, seeks an advance determination that the FDIC as receiver of the bank is required to provide indemnification, contribution, or reimbursement for any amounts which SEBC is ultimately required to pay on these claims.

In Count XVII of the complaint, Plaintiffs seek a declaratory judgment that the FDIC must indemnify SEPI for any liabilities SEPI may incur as a result of certain lease obligations it entered into on behalf of SEBNA.

Finally, in Count XVIII of the complaint, Plaintiffs seek a declaratory judgment that the FDIC as receiver must indemnify SEBC for any liabilities it may incur arising out of various contracts whereby SEBC obligated itself to perform in the case of SEBNA's default.

Defendants move to dismiss the related counts alleging that such claims were not "due and owing" on the date of the bank's insolvency.

11/ SEBC had guaranteed the purported obligations of SEBNA as to these individuals.

In cases involving claims against the receiver of an insolvent bank, "[i]t is well settled that the rights and liabilities of a bank and the bank's debtors and creditors are fixed at the declaration of the bank's insolvency." American Nat'l Bank of Jacksonville v. FDIC, 710 F.2d 1528, 1540 (11th Cir. 1983); see also Kennedy v. Boston-Continental Nat'l Bank, 84 F.2d 592, 596 (1st Cir. 1936) ("to establish a claim against an insolvent bank in receivership, the liability of the bank . . . must have accrued and become unconditionally fixed on or before the time the bank was declared insolvent"), cert. dismissed, 300 U.S. 648 (1937); Dababneh v. FDIC, 971 F.2d 428 (10th Cir. 1992) (same); Marsa v. Metrobank for Sav., F.S.B., 825 F. Supp 658, 667 (D.N.J. 1992); Bayshore Executive Plaza Partnership v. Federal Dep. Ins. Corp., 750 F. Supp. 507, 511 (S.D. Fla. 1990) (claim must accrue and become unconditionally fixed on or before date[12/] bank is declared insolvent), aff'd, 943 F.2d 1290 (11th Cir. 1991).

The parties do not dispute the applicability of the above cited law. The only dispute is whether the claims at issue accrued prior to the declaration of insolvency and were therefore due and owing."

Defendants argue any "potential claims" asserted against the failed bank are barred by definition because they were non-existent at the time of insolvency. Plaintiffs argue

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[12/] Although the Bayshore court used the phrase "on or before the date when the bank was declared insolvent," there is no indication that the court intended to create a 24 hour period in which claims could become unconditionally fixed. Instead, the relevant focal point is the moment the bank is declared insolvent. Bayshore, 750 F. Supp. at 511 ("the rights and liabilities of a bank and the bank's debtors and creditors are unconditionally fixed at the declaration of the bank's insolvency").

in response that the claims asserted "arose and spread [their] roots in liabilities that SEBNA incurred before it was declared insolvent." (D.E. 45 at 27).

Although this Court appreciates the predicament that Plaintiffs are in as a result of their status as guarantors of the various agreements entered into by SEBNA, there is nothing in the case law to support Plaintiffs' proposition that pre-insolvency agreements "blossom" into unconditional debts for purposes of meeting the due and owing requirement imposed by law.

Accordingly, SEBNA is immune from liability as to any "potential claims" as described in counts XVI-XVIII asserted against SEBC that accrued, or will accrue, subsequent to the appointment of the FDIC-receiver.

Finally, Plaintiffs make reference to current claims filed by former employees for "various severance payments and other amounts due and owing as a result of their termination." (D.E. 62, Count 122). However, these claims are similarly barred because severance and other termination related payments are contingent, not fixed liabilities. See Office of Professional Employees Int'l Union, 813 F. Supp. 39, 45 (D.D.C. 1993), rev'd on other grounds, 962 F.2d 63; Marsa v. Metrobank for Sav., 825 F. Supp. 658 (D.N.J. 1993); McMillian v. FDIC, No. 0273-CIV-MOORE, slip op. at 6-7.

In Office & Professional Employees Int'l Union, the court held that employees' claims for severance pay were not cognizable under Section 1821(e)(3)(A)(ii)(I) of FIRREA because at the moment of insolvency, the plaintiffs' rights to severance pay had not accrued and were still contingent. The court reasoned:

> Any claims [the employees] might have raised at the time [of the receiver's appointment] were uncertain. A number of things could have happened. The receiver could have retained the employees and accepted their continued service ... and no severance pay would have been owed. The employees might have left the bank voluntarily, and no severance pay would have been owed. In short, at the time of appointment, the employees could not have claimed severance pay under the collective bargaining agreement.

Id. The same reasoning applies to the instant case as to all claimants that were terminated at the time of, and subsequent to, the declaration of insolvency.

Accordingly, because the claimants rights to severance benefits were contingent at the time SEBNA was declared insolvent, the Plaintiffs cannot bring a claim against the FDIC-receiver for benefits. American Nat'l Bank, 710 F.2d at 1540 (rights and liabilities of a bank and the bank's debtors and creditors are fixed at the declaration of the bank's insolvency); Kennedy, 84 F.2d at 596 ("to establish a claim against an insolvent bank in receivership, the liability of the bank . . . must have accrued and become unconditionally fixed on or before the time the bank was declared insolvent").[13/]

[13/] Because the undersigned finds that Plaintiffs' claims were not "due and owing", there is no need to address Defendants' alternative arguments to dismiss the instant counts.

RECOMMENDATION

After careful consideration and for the foregoing reasons, the undersigned hereby

RECOMMENDS that Defendants' Motion to Dismiss Counts VII-XVIII (DE 33, 35) be GRANTED.

The parties have ten (10) days from the filing of this Report and Recommendation to file written objections, if any, with the Honorable Daniel T.K. Hurley, United States District Judge. See 28 U.S.C. Sec. 636 (1991). Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745, 750 (11th Cir.), cert. denied, 488 U.S. 958 (1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 7th day of November, 1994.

/s/ Barry L. Garber
BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
U.S. District Judge Daniel T.K. Hurley
Counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 95-4324

WILLIAM A. BRANDT, JR., as
Chapter 7 Trustee of the Estate of
Southeast Banking Corporation,

SOUTHEAST PROPERTIES INC.,

FINANCIAL CARRIERS, INC.,

ALL OTHER ENTITIES DESCRIBED
IN EXHIBIT "A" ATTACHED
HERETO, FIRST CITY BANCORP,
INC., FIRST DEVELOPMENT CORP.
OF JACKSONVILLE, THE FIRST
NATIONAL BANK OF PALM
BEACH, INC., FIRST PIONEER
CORPORATION, FIRST PLUS
INSURANCE AGENCY, INC.,
SEMCO SERVICES, INC., SWQ
HOLDINGS, INC., SOUTHEAST
ACQUISITION COMPANY,
SOUTHEAST CREDIT INSURANCE
AGENCY, INC., SOUTHEAST
MERCHANT BANKING
CORPORATION, SOUTHEAST
VENTURE CAPITAL, LTD., I,
SOUTHEAST VENTURE CAPITAL,
LTD., II,

Plaintiffs-Appellants,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion July 11, 11th Cir., 1996, ___ F.2d ___).

Before: DUBINA, BLACK and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ED E. CARNES

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4324
Non-Argument Calendar

District Court Docket No. 93-0536-CIV

WILLIAM A. BRANDT, JR. as Chapter 7 Trustee of the Estate of Southeast Banking Corporation,

SOUTHEAST PROPERTIES, INC.,

FINANCIAL CARRIERS, INC.,

ALL OTHER ENTITIES DESCRIBED IN EXHIBIT "A" ATTACHED HERETO, FIRST CITY BANCORP, INC., FIRST DEVELOPMENT CORP. OF JACKSONVILLE, THE FIRST NATIONAL BANK OF PALM BEACH, INC., FIRST PIONEER CORPORATION, FIRST PLUS INSURANCE AGENCY, INC., SEMCO SERVICES, INC., SWQ HOLDINGS, INC., SOUTHEAST ACQUISITION COMPANY, SOUTHEAST CREDIT INSURANCE AGENCY, INC., SOUTHEAST MERCHANT BANKING CORPORATION, SOUTHEAST VENTURE CAPITAL, LTD., I, SOUTHEAST VENTURE CAPITAL, LTD., II,

Plaintiffs-Appellants,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before DUBINA, BLACK and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and REVERSED in part in accordance with the opinion of this Court.

IT IS FURTHER ORDERED THAT each party bear their own costs on appeal.

Entered: July 11, 1996
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNoble
Deputy Clerk

ISSUED AS MANDATE: 9/19/96

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-0563-CIV-HURLEY

WILLIAM A. BRANDT, JR. as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, SOUTHEAST PROPERTIES, INC., FINANCIAL CARRIERS, INC., et al.,	
Plaintiffs,	**ORDER OF RULE 54(B) CERTIFICATION AND ENTRY OF JUDGMENT**
v.	
FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A. and Southeast Bank of West Florida, FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE,	
Defendants.	

THIS CAUSE came before the Court upon Plaintiffs' Motion for Entry of Final Judgment on Dismissed Claims Pursuant to Rule 54(b), and Memorandum of Law in Support. Upon consideration of said Motion and the December 16, 1994 Order Upon Report and Recommendations of Magistrate Judge dismissing Counts VII through XVIII of the Consolidated Complaint, and it appearing to the Court that there is no just reason for delay in entering a final judgment on the dismissed counts, it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

ORDERED AND ADJUDGED that final judgement be entered dismissing Counts VII through XVIII of the Consolidated Complaint.

DONE AND ORDERED in Chambers at Miami, Florida, this _____ day of _____, 1995.

Stamp [Signed and Dated
Jan 31 1995
Judge Daniel T.K. Hurley]

_____
DANIEL T.K. HURLEY

JUDGMENT ENTERED.

_____
Clerk, United States District Court
Southern District of Florida
_____ day of_____, 1995.

Copies furnished to:

HILARIE BASS, ESQ., 1221 Brickell Ave., Miami, FL. 331321

GREGORY TAYLOR, ESQ., FDIC, 550 17th St., N.W., Washington, D.C. 20429

ALBERT T. GIMBEL, ESQ., Dept. of Banking and Finance, The Capitol, Ste. 1302, Tallahassee, FL 32399-0350

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-0563-CIV-HURLEY

WILLIAM A. BRANDT, JR. as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, SOUTHEAST PROPERTIES, INC., FINANCIAL CARRIERS, INC., and ALL OTHER ENTITIES DESCRIBED IN EXHIBIT "A" ATTACHED HERETO, Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A. and Southeast Bank of West Florida, FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE, Defendants.	**AMENDED, SUPPLEMENTAL AND CONSOLIDATED COMPLAINT FOR DAMAGES AND DECLARATORY AND OTHER EQUITABLE RELIEF**

_____)

Plaintiffs, WILLIAM A. BRANDT, JR., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation ("BRANDT", "Trustee" or "SEBC"), SOUTHEAST PROPERTIES, INC. ("SEPI"), FINANCIAL CARRIERS, INC. ("Financial Carriers"), and all other entities described in Exhibit "A" attached hereto (the "Subsidiaries") (collectively referred to as "Plaintiffs"), sue the FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC" or "Receiver"), as Receiver for Southeast Bank, N.A. ("SEBNA") and Southeast Bank of West Florida ("SEBWF"), FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE, stating as follows:

Identity of Parties

1. BRANDT is the duly elected and qualified successor trustee of the SEBC Chapter 7 estate, having been elected at a reconvened meeting of creditors on April 14, 1992, and confirmed in that election by order of the bankruptcy court on April 28, 1992. SEBC, at all times material, was and still is a Florida corporation with its principal place of business in Miami, Florida.

2. SEPI, at all times material, was and still is a Florida corporation with its principal place of business in Miami, Florida. SEPI is a wholly-owned subsidiary of SEBC.

3. Financial Carriers, at all times material, was and still is a Florida corporation with its principal place of

business in Miami, Florida. Financial Carriers is a wholly-owned subsidiary of SEBC.

4. The Subsidiaries, at all times material, were and still are Florida corporations with their principal places of business in Miami, Florida. The Subsidiaries are all wholly-owned subsidiaries of SEBC.

5. The FDIC is a corporation organized under the laws of the United States and is sued both in its capacity as Receiver for SEBNA and SEBWF ("FDIC-Receiver"), and in its corporate capacity ("FDIC Corporate").

6. The State of Florida Department of Banking and Finance ("State Department of Finance") is a state governmental department empowered to regulate state chartered banking institutions.

Jurisdiction and Venue

7. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1334 and Section 212(d)(6)(A)(ii) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. §1821(d)(6)(A)(ii). Venue is proper in this District under the same provision of FIRREA, as this is the District within which SEBNA's principal place of business was located.

Facts Common To All Counts

8. Prior to its failure in September 1991, SEBC was one of the premier bank holding companies in Florida, controlling more than $11 billion in assets through SEBNA, SEBWF and other subsidiaries and affiliates.

9. At all times prior to September 19, 1991, SEBNA and SEBWF were the principal, wholly-owned banking subsidiaries of SEBC. SEBNA was a national bank duly organized and existing under the laws of the United States. SEBWF was a state-chartered banking association organized and existing under the laws of the State of Florida.

10. On September 19, 1991, the Office of the Comptroller of the Currency's ("OCC") Senior Deputy Comptroller for Bank Supervision Operations determined and declared that SEBNA was insolvent, and appointed the FDIC as Receiver.

11. Contemporaneous with the OCC's declaration of insolvency as to SEBNA, the FDIC, in its corporate capacity, issued a Notice of Assessment of Liability against SEBWF demanding immediate payment of the sum of $143 million purportedly pursuant to 12 U.S.C. § 1815(e).

12. Unable to comply with the FDIC's demand for payment, SEBWF was thereupon declared insolvent and closed by the Florida.

13. Substantially all of the assets of SEBNA and SEBWF were then sold by the FDIC, as receiver for both institutions, to First Union National Bank of Florida.

14. On September 20, 1991, SEBC filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §101, et seq., as amended, in the United States Bankruptcy Court for the Southern District of Florida; docketed as Case Number 91-14561-BKC-SMW. As a matter of law, upon such filing all of the legal and equitable interests of SEBC in property became property of

the bankruptcy estate, pursuant to Section 541 (a) of the Bankruptcy Code, 11 U.S.C. §541(a).

The FDIC Claims Process

15. On or about September 30, 1991, the FDIC published its notice to creditors fixing December 31, 1991 as the bar date for all claims to be filed against the SEBNA and SEBWF Receiverships. On December 30, 1991, the Plaintiff timely filed their proofs of claim against the SEBNA and SEBWF Receiverships together with, where available, accompanying documentation. Thereafter, the original claims were amended, modified and supplemented from time to time.

16. Pursuant to 12 U.S.C. §1821(d)(5)(A)(i), the FDIC had 180 days from the date the Plaintiffs filed his proofs of claim within which to allow or disallow the claims. This period was enlarged by a series of consensual extensions in accordance with 12 U.S.C. §1821(d)(5)(A)(ii), the last such extension operating through and including January 22, 1993. As of the date this action was commenced, the FDIC had failed to notify the Plaintiffs of any determination with respect to the claims.

17. Pursuant to 12 U.S.C. §1821(d)(6)(A), as a result of the FDIC's failure to notify the Plaintiffs of any such determination on or before January 22, 1993, the last date of the consensual extension period within which the FDIC was to decide on the pending claims, the Plaintiffs were required to either bring this action or seek agency review of such claims.

18. As a result of the foregoing, all conditions precedent to the institution of this action have been waived, satisfied and/or have occurred.

COUNT I
(National Bank Act)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 above as though fully set forth herein.

19. This is an action for the entry of mandamus relief or, in the alternative, declaratory relief against the FDIC, as receiver for SEBNA pursuant to 12 U.S.C. § 197. By this Count, the Trustee seeks the entry of an order compelling the FDIC, as receiver of SEBNA and SEBWF, to call a meeting of the shareholders of such institutions for the purpose of allowing them to determine through a vote of the shareholders whether the FDIC should continue to wind up the affairs of SEBNA and SEBWF. As required by statute, the shareholders of a nationally chartered bank may compel the FDIC to hold a meeting of shareholders for the purpose of electing an agent to whom the FDIC would be required to transfer all remaining assets, and who would have the responsibility of completing the liquidation of the remaining assets in the receivership estate. In the present case, although SEBWF is a state chartered bank, due to the fact that the FDIC-Receiver has chosen to administer the receivership estates of SEBNA and SEBWF on a consolidated basis, the relief under the National Bank Act is requested as to both SEBNA and SEBWF.

20. At all material times prior to the regulatory seizure of SEBNA and SEBWF and the appointment of the FDIC as receiver, SEBC owned 100% of the authorized,

issued and outstanding shares of stock of SEBNA and SEBWF, all of which became property of the SEBC estate under the direction and control of the Trustee for the benefit of SEBC's creditors, bondholders and shareholders.

21. Upon information and belief, the FDIC-Receiver has paid or has sufficient funds to pay all outstanding creditors of SEBNA and SEBWF whose claims have been allowed. The funds available for such purpose are sufficient to provide for a distribution to creditors of the receivership estates of 100% of all allowed creditors' claim amounts.

22. Upon information and belief, to the extent that any claims filed against the SEBNA and SEBWF receivership estates remain disputed but not finally disallowed, there are more than sufficient funds in the receivership estates to ensure prompt payment of these claims. Accordingly, to the extent that these claims are allowed, all creditors, including the Trustee, shall receive full and complete payment on their allowed claims and a surplus will remain for remittance to the Trustee in respect of the shares of stock in SEBNA and SEBWF.

23. 12 U.S.C. § 197(a) provides in pertinent part that:

> Whenever any national banking association shall have been or shall be placed in the hands of a receiver, . . . and when . . . there has been paid to each and every creditor of such association whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the recei-

vership, the Comptroller of the Currency or the Federal Deposit Insurance Corporation, where that Corporation has been appointed receiver of the bank, shall call a meeting of the shareholders of the association . . . . At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of the association, or whether an agent shall be elected for that purpose . . . In case such majority shall determine that the receiver shall be continued, the receiver shall thereupon proceed with the execution of the trust, and shall sell, dispose of, or otherwise collect the assets of the association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon such receiver so far as they remain applicable. In case such meeting shall, by the vote of majority of the stock and number of shares, determine that an agent shall be elected, the meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least the majority of stock and number of shares shall be declared the agent for the purposes hereinafter provided; . . . the Comptroller and the receiver, or the Federal Deposit Insurance Corporation, where that Corporation has been appointed receiver of the bank, shall thereupon transfer and deliver to such agent all the uncollected or other assets of the association then remaining in the hands or subject to the

> order and control of the Comptroller and such receiver, or either of them, or the Federal Deposit Insurance Corporation . . . .

24. The statute, therefore, offers protection to the shareholders of a financial institution in receivership to the extent of ensuring that the shareholders can regain control over the institution's assets at such time as all claims which have been allowed are paid. As Trustee of a debtor which is the 100% shareholder of banks in receivership whose creditors have either been paid in full or for whom assets remain in the receivership estates sufficient to pay in full all disputed claims that are likely to be paid, the National Bank Act ensures that the Trustee is entitled to direct and control the liquidation of the remaining assets of SEBNA and SEBWF, the proceeds of which will benefit the estate of SEBC.

25. Plaintiffs hereby make demand upon the FDIC-Receiver that a shareholder meeting be commenced for the purposes set forth in 12 U.S.C. § 197(a). The FDIC-Receiver has failed and/or refused to comply with the requirements of 12 U.S.C. § 197(a), in that it has not called a meeting of shareholders of SEBNA and SEBWF and provided shareholders an opportunity to elect an agent empowered to liquidate and distribute the remaining assets of the receivership estates, despite the fact that creditors have been paid and receivership expenses satisfied.

26. The Trustee, as 100% shareholder of SEBNA and SEBWF, will suffer irreparable harm by reason of the FDIC-Receiver's continued assertion of control over the remaining unliquidated assets. This is the case because at the present time, the FDIC-Receiver no longer has an interest in maximizing the value of the remaining assets to be

liquidated since there are sufficient funds available to pay all creditors of the receiverships and, therefore, the FDIC-Receiver will not participate in any excess proceeds. In addition, to the extent that the FDIC-Receiver remains as receiver of SEBNA and SEBWF, the assets of the receivership estates will be subject to further depletion as the FDIC's costs of the receiverships are paid from assets which should otherwise be available to the Trustee, as 100% shareholder of SEBNA and SEBWF.

WHEREFORE, the Trustee requests that this Court enter a judgment as follows:

(a) directing that the FDIC-Receiver call a meeting of the shareholders of SEBNA and SEBWF for the purpose of allowing such shareholders to elect the agent of their choice for purposes of liquidating the remaining assets of the SEBNA and SEBWF receivership estates;

(b) or alternatively, declaring that the FDIC-Receiver is required upon satisfaction of the conditions set forth in 12 U.S.C. § 197(a), to call shareholders meetings for the purposes set forth in said statutory provision; and

(c) granting such other and further relief as this Court deems just and proper.

COUNT II
(Unconstitutional Taking Without Just Compensation)

Plaintiffs incorporate the allegations contained in Paragraphs 1 through 18 above as though fully set forth herein.

27. This is an action to recover damages against the FDIC-Receiver, FDIC-Corporate and Florida Department of Banking based upon their unconstitutional taking of the property and property interests of SEBWF and the Trustee as 100% shareholder of SEBWF, without just compensation in violation of the Fifth Amendment of the United States Constitution.

28. At all material times prior to regulatory seizure of SEBNA and SEBWF, SEBWF was a state chartered banking association with its principal place of business located in Pensacola, Florida. At all material times, SEBC owned 100% of the issued and outstanding shares of stock of SEBWF.

29. At all material times, SEBWF was operated as a separate and distinct financial institution from SEBNA, as the core banking operations of SEBWF were conducted on an autonomous basis.

30. On September 19, 1991, the Office of the Comptroller of the Currency determined and declared that SEBNA was insolvent, and appointed the FDIC as receiver. The OCC's determination of insolvency was predicated upon SEBNA's immediate inability to repay certain loans in the aggregate amount of approximately $568 Million which SEBNA had received from the Federal Reserve Bank in Atlanta, Georgia during the preceding three month period.

31. Contemporaneous with the OCC's declaration of insolvency, the FDIC issued a Notice of Assessment of Liability against SEBWF, allegedly pursuant to 12 U.S.C § 1815(e) and 12 C.F.R. s 308.165 et seq.

32. In the Notice of Assessment, the FDIC claimed that it anticipated incurring losses in connection with the purported default of SEBNA in the total amount of $143 Million and demanded immediate payment of this amount from SEBWF.

33. The amount demanded by the FDIC was in excess of SEBWF's capital. Based upon this manufactured insolvency, the Florida Department of Banking immediately declared SEBWF insolvent, closed such bank in Administrative Proceeding No. 2974-B, and requested the FDIC to act as receiver of SEBWF.

34. Simultaneously with the closing of SEBNA and SEBWF, the FDIC, in its corporate capacity and as a newly appointed receiver for SEBNA and SEBWF, entered into an Agreement with First Union National Bank of Florida transferring substantially all of the assets of these institutions to First Union.

35. By September 20, 1991, SEBWF ceased to operate as a separate and autonomous financial institution, many of its assets and liabilities having been sold to First Union, and its stock, owned by SEBC, rendered worthless.

36. At all times prior to the Notice of Assessment issued by the FDIC, SEBWF was a solvent financial institution, whose book value of its shares at the time of the seizure was in excess of $8 Million. The seizure of the assets of SEBWF under the common-control theory caused

direct and substantial injury to SEBC by rendering its entire capital investment in SEBWF worthless.

37. No compensation was paid to SEBWF or SEBC, as SEBWF's sole shareholder, for the value of the property and property interests which were taken by the FDIC-Corporate, Florida Department of Banking and FDIC-Receiver. The property taken by these Defendants for which no compensation was paid, was for public use and did not benefit the institution.

38. The Notice of Assessment issued by the FDIC-Corporate against SEBWF in the amount of $143 Million was designed and intended by the FDIC-Corporate to render SEBWF insolvent, resulting in its closing by the Florida Department of Banking and the appointment of FDIC as receiver of the institution. At all times hereto, FDIC-Corporate, FDIC-Receiver and the Florida Department of Banking conspired to create an artificial insolvency on the part of SEBWF, so that such institution could be seized and its assets, as well as those of SEBNA, sold in a collective package to a single third-party purchaser, First Union.

39. The chain of events which led to the closing and sale of the assets of SEBWF were predicated upon the FDIC's purported powers under 12 U.S.C. § 1815(e)(1)(A), which provides in pertinent part that:

> Any insured depository institution shall be liable for any loss incurred by the Corporation, or any loss which the Corporation reasonably anticipates incurring after August 9, 1989 in connection with-

> (i) the default of a commonly controlled insured depository institution; or
>
> (ii) any assistance provided by the Corporation to any commonly controlled insured depository institution in danger of default.

40. At the time of SEBWF's acquisition by SEBC, neither SEBWF nor SEBC had any reason to believe or reasonably expect that SEBWF could some day be held liable for the financial obligations of SEBNA, which operated autonomously from SEBWF. The "common control" provisions of FIRREA, 12 U.S.C. § 1815(e), enacted long after SEBWF was acquired by SEBC, constituted a dramatic and unprecedented modification of existing federal banking laws, and indeed, of longstanding U.S. legal tradition which, from the beginning of this nation's legal history, had respected the separate corporate personalities of financial institutions, even when affiliated by common ownership. For centuries prior to the adoption of the "common control" statute in 1989, SEBWF, or a similarly situated bank, could not have been held responsible for the indebtedness and financial obligations of a completely separate and autonomous bank, such as SEBNA, simply because both banks were owned by the same holding company. The "common control" provision of FIRREA thus substantially interfered with the reasonable investment-backed expectations of SEBC, as SEBWF's sole shareholder.

41. The "common control" provision of 12 U.S.C. § 1815(e), which thus permitted the FDIC, in its corporate capacity to assess SEBWF with the liabilities of SEBNA, the

Florida Department of Banking to declare SEBWF insolvent and close the institution, and the FDIC, as receiver, to sell its assets to a third party purchaser, constitutes an unconstitutional taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution.

42. In the context of this case, such provision effectively required an independent financial institution, SEBWF, involuntarily to guarantee a failed affiliated bank's obligations to the FDIC, without the assessed financial institution having been provided notice at the time it was formed and began operating that it could ever be held responsible for such debts. The provision also deprived SEBC, the sole shareholder of SEBWF, of a valid property interest of which SEBC was not put on notice that it could be deprived at the time it purchased the shares of SEBWF.

43. The "common control" provisions of 12 U.S.C. § 1815(e) do not substantially advance any legitimate governmental interest and deprived SEBWF, and SEBC, as 100% shareholder of SEBWF, of a valuable property interest without just compensation.

WHEREFORE, the Trustee requests that this Court enter judgment as follows:

(a) declaring and finding that 12 U.S.C. § 1815(e) and the regulations promulgated thereunder provide for an unconstitutional taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution;

(b) awarding the Trustee, as shareholder of SEBWF, damages constituting the value of the shares and equity in SEBWF prior to the Notice of Assessment being issued by the FDIC;

(c) or, in the alternative, rescinding the sale of SEBWF's assets to First Union and requiring the FDIC-Corporate, the FDIC-Receiver and the Florida Department of Banking to reinstate SEBWF's charter and to permit SEBWF to continue its operations in the same manner as prior to the improper seizure of SEBWF on September 19, 1991; and

(d) granting such other and further relief as this Court deems just and proper.

COUNT III
(Denial of Procedural Due Process in Violation of the Fifth Amendment of the United States Constitution)

Plaintiffs incorporate the allegations contained in Paragraphs 1 through 18 and 27 through 43 above, as though fully set forth herein.

44. This is an action to recover damages against the FDIC-Corporate, the FDIC-Receiver and the Florida Department of Banking by reason of these Defendants' unlawful and unconstitutional actions in connection with the seizure of SEBWF and the sale of SEBWF's assets to First Union National Bank of Florida.

45. 12 U.S.C. § 1815(e) permits the FDIC, in its corporate capacity, to make demand upon a "commonly controlled insured depository institution" to pay any loss which the FDIC, in its corporate capacity, reasonably anticipates incurring as the result of the failure of another "commonly controlled" financial institution.

46. The rules of practice and procedure to be utilized by the FDIC in connection with its exercise of its powers under 12 U.S.C. § 1815(e) are codified in 12 C.F.R. §§ 308.165 et seq. These rules of practice and procedure purport to provide a "commonly controlled" depository institution upon which an assessment is served under 12 U.S.C. § 1815 (e), with certain procedural safeguards, including permitting parties with an interest in the "commonly controlled" institution to challenge such Notice of Assessment of Liability through an administrative hearing.

47. Despite purporting to provide due process procedural safeguards to a "commonly controlled" financial institution, the regulations are facially, and in practice, flawed and constitutionally deficient as applied, since in actuality they deny parties with an interest in the "commonly controlled" financial institution the right to challenge such assessment.

48. The regulations are internally inconsistent and facially invalid in that they provide an illusory opportunity for a commonly controlled bank that has been assessed for the debts of an affiliated bank to challenge the assessment made by the FDIC within twenty days of the assessment. 12 C.F.R. § 308.167. However, any opportunity to be heard is effectively negated by the actions which the FDIC is permitted to take in demanding immediate payment of the assessed amount. 12 C.F.R. § 308.168.

49. This "immediate assessment" provision is used by the FDIC-Corporate to negate the assessed bank's twenty-day window to challenge the assessment since unless the institution presented with a notice of assessment pays the obligation immediately upon demand by the FDIC, the bank is immediately declared insolvent and the FDIC is appointed as the receiver for the bank.

50. The fact that this process can all be performed within one day of the receipt of a Notice of Assessment - as happened in the case of SEBWF - effectively negates the assessed bank's ability to challenge the assessment. Once the FDIC becomes receiver for the assessed institution, it claims that it is the only entity which has standing to object or challenge the amount of the assessment. The FDIC as receiver will not challenge the assessment previously issued by itself in its corporate capacity.

51. The procedures provided under 12 C.F.R. § 308 165 et seq. are an unconstitutional violation of the Due Process Clause of the Fifth Amendment of the United States Constitution because they permit the government to provide a supposed safeguard of citizens' rights against unwarranted government intrusion, then render the safeguard illusory, unexercisable and meaningless. The regulations embodied in 12 C.F.R. s 308.165 et seq. are facially invalid in that they provide just such an illusory, unexercisable and meaningless opportunity to be heard upon the deprivation by the United States of a constitutionally protected property interest.

52. In the instant case, SEBWF received the Notice of Assessment of Liability, was declared insolvent by the Florida Department of Banking, and the FDIC was appointed receiver, almost simultaneously. SEBWF, and

SEBC as 100% shareholder, were provided no opportunity to challenge the Notice of Assessment and, pursuant to the applicable regulations, would have no right to challenge the Notice of Assessment since the FDIC, in its capacity as receiver, had already sold SEBWF's assets to First Union National Bank of Florida. It is beyond rational belief that the FDIC as receiver would ever subsequently challenge its own actions by questioning the Notice of Assessment.

53. Further, any efforts on the part of SEBWF or SEBC, as 100% shareholder of SEBWF, to compel the FDIC-Receiver to challenge such Notice of Assessment of Liability would have fallen on deaf ears, as the FDIC-Receiver had already agreed to and thereafter simultaneously transferred the assets of SEBWF to First Union.

54. The safeguards purportedly intended to protect "commonly controlled" depository institutions, such as SEBWF, are thus constitutionally invalid as they deny such "commonly controlled" institutions and shareholders thereof their procedural due process rights by permitting the FDIC to act arbitrarily and capriciously in connection with the seizure of a "commonly controlled" financial institution.

WHEREFORE, the Trustee demands judgment as follows:

(a) declaring and finding that 12 U.S.C. § 1815(e) and the regulations promulgated thereunder embodied by 12 C.F.R. s 308.165 et seq. provide for a deprivation of procedural due process in violation of the Fifth Amendment of the United States Constitution;

(b) awarding the Trustee, as shareholder of SEBWF, damages constituting the value of the shares and equity in SEBWF prior to the Notice of Assessment being issued by the FDIC;

(c) or, in the alternative, rescinding the sale of SEBWF's assets to First Union and requiring the FDIC-Corporate, the FDIC-Receiver, and the Florida Department of Banking to reinstate SEBWF's charter and to permit SEBWF to continue its operations in the same manner as prior to the improper seizure of SEBWF on September 19, 1991; and

(d) granting such other and further relief as this Court deems just and proper.

COUNT IV
Breach of Promissory Notes

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

55. Between 1984 and 1989, SEBNA executed and delivered to SEBC four (4) promissory notes (the "Promissory Notes"), each of which specified that SEBC's claims to collection therefrom were subordinated to certain discreet and designated creditors of SEBNA:

(a) the first Promissory Note was dated December 31, 1984, was in the amount of $40 million, and contained a maturity date of December 1996. A copy of this

Promissory Note is attached hereto as Exhibit "B";

(b) the second Promissory Note was dated December 30, 1985, was in the amount of $60 million, and contained a maturity date of November 5, 1997. A copy of this Promissory Note is attached hereto as Exhibit "C";

(c) the third Promissory Note was dated June 24, 1987, was in the amount of $30 million, and contained a maturity date of March 14, 1999. A copy of this Promissory Note is attached hereto as Exhibit "D";

(d) the fourth Promissory Note was dated June 30, 1989, was in the amount of $40 million, and contained a maturity date of March 14, 2001. A copy of this Promissory Note is attached hereto as Exhibit "E".

56. Upon the filing of the Chapter 7 petition by SEBC, the Promissory Notes became the property of the bankruptcy estate pursuant to 11 U.S.C. §541(a). The Trustee is the owner and holder of the Promissory Notes, and is entitled to collect the indebtedness represented thereby.

57. Events of default have occurred under the terms of the Promissory Notes including, without limitation:

(a) the declaration of SEBNA as insolvent, and the resulting appointment of the FDIC as receiver for SEBNA; and

(b) the failure of SEBNA or any other entity on its behalf to make semi-annual interest payments as required by the terms of each of the Promissory Notes.

58. The principal obligations represented by the Promissory Notes are liquidated sums not subject to dispute as to amount or right of payment.

59. As part of his proofs of claim, the Trustee duly demanded payment under the Promissory Notes, but the FDIC has failed or otherwise refused to comply with such demand.

60. All conditions precedent to SEBNA's obligation to pay SEBC the indebtedness due pursuant to the Promissory Notes, and the Trustee's right to bring and maintain this action, have been waived, excused or have occurred.

61. The FDIC-Receiver owes the Trustee, on behalf of SEBC, at least $150,000,000.00, which represents the sum of the aggregate outstanding principal amount of the Promissory Notes and the aggregate interest accrued and unpaid on the Promissory Notes.

62. As a result of the aforementioned defaults, it has become necessary for the Trustee to retain the legal services of the undersigned attorneys to collect said indebtedness, and he has agreed to pay said attorneys a reasonable fee for their services. The FDIC-Receiver is liable for payment of all reasonable attorneys' fees and costs incurred by the Trustee in the prosecution of this action.

WHEREFORE, the Trustee requests that this Court enter a judgment against the FDIC-Receiver in the amount of at least $150,000,000.00, plus all applicable interest, reasonable attorneys' fees and costs incurred by the Trustee in the prosecution of this action, and grant such other and further relief as this Court deems just and proper.

COUNT V
Injunctive and Declaratory Relief
(FDIC's Distribution of SEBNA's Assets)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 and 55 through 62 as though fully set forth herein.

63. This is an action for injunctive relief and a declaratory judgment pursuant to 28 U.S.C. §2201 to determine the relative rights of, and resolve an existing controversy between Plaintiffs and the FDIC-Receiver.

64. Pursuant to the terms of the Promissory Notes, SEBC's claims against SEBNA are subordinated to all "Senior Indebtedness," which is defined by the Promissory Notes solely to include the following obligations, and no other indebtedness:

(a) SEBNA's obligations to its depositors;

(b) bankers' acceptances and letters of credit;

(c) SEBNA's obligations to any Federal Reserve Bank;

(d) SEBNA's obligations to the FDIC and any rights acquired by the FDIC as a result of 12 U.S.C. § 1823(c), (d) or (e);

(e) any indebtedness of SEBNA for money borrowed whether outstanding on the Issue Date or thereafter created, assumed, or incurred, other than this Note, except obligations ranking on a parity herewith or ranking junior hereto; and

(f) Any deferrals, renewals or extensions of any such Senior Indebtedness.

65. The FDIC-Receiver asserts that the Trustee's claims on the Promissory Notes are subordinated to general creditors of SEBNA and others not specifically included within the definition of "Senior Indebtedness." The Trustee is also informed and believes that the FDIC-Receiver has made certain payments out of the SEBNA estate to general creditors, such as trade creditors, while at the same time refusing and otherwise failing to make payments to the Trustee as required under the Promissory Notes. Such payments to general creditors by the FDIC-Receiver are violative of 12 U.S.C. § 91 and 12 U.S.C. § 194, which provide that the FDIC-Receiver is required to distribute SEBNA's assets on a pro rata basis among creditors of the same priority rank.

66. Absent a declaratory judgment that the Trustee is entitled to payment in pari passu with all creditors of SEBNA not specifically included within the definition of "Senior Indebtedness," and an injunction requiring the FDIC-Receiver to pay the Trustee in respect of the Promissory Notes, the FDIC-Receiver will continue to

ignore the Trustee's right to receive appropriate payments of debt as provided in the Promissory Notes. Moreover, the Trustee stands to suffer substantial harm because the assets of the SEBNA estate will be forever depleted to the detriment of the Trustee.

67. There is an actual and substantial controversy between the Trustee and the FDIC-Receiver regarding the priority of claims as the same relates to the FDIC-Receiver's obligations to the Trustee under the Promissory Notes.

WHEREFORE, the Trustee requests that this Court enter a judgment declaring that the Trustee is to be paid on the Promissory Notes in pari passu with all general creditors and others not specifically included within the definition of "Senior Indebtedness" under the promissory notes. Further, the Trustee requests that this Court declare that the Trustee is entitled to receive, in respect of the claims under the Promissory Notes, a distribution equal to that made by the FDIC-Receiver to general creditors or others not specifically included within the definition of "Senior Indebtedness." Finally, the Trustee requests that this Court direct the FDIC-Receiver to pay the Trustee in respect of the Notes.

COUNT VI
Accounting

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 and 55 through 67 as though fully set forth herein.

68. This is an action against the FDIC-Receiver for an accounting of certain books, records and assets relating to the SEBNA and SEBWF receiverships which are in the FDIC's exclusive possession and control in order to

determine the respective rights of the parties to this action. Plaintiffs seek this equitable relief because they have no adequate remedy at law.

69. Pursuant to 12 U.S.C. §91 and 12 U.S.C. §194, the FDIC-Receiver was and is required to distribute SEBNA and SEBWF's assets on a pro rata basis among creditors of the same priority rank. Moreover, pursuant to 12 U.S.C. § 1821(d)(15)(A), the FDIC-Receiver is required to prepare and make available accountings as to the financial affairs and status of the receiverships.

70. The FDIC-Receiver has failed to carry out its statutory mandate by, without limitation,

> (a) failing to pay the Trustee and other Plaintiffs, as creditors of SEBNA and SEBWF, their pro-rata share of SEBNA and SEBWF's assets;
>
> (b) improperly refusing to make required payments to the Trustee on purported grounds that SEBC holds subordinated claims while, at the same time, making payments to certain creditors, such as trade creditors, whose claims are entitled to no priority over the Trustee's claim described in Count IV; and
>
> (c) failing to provide complete and meaningful accountings of the receiverships.

71. Considering the complexity of the receivership at issue, it is necessary for the Plaintiffs to gain access to all pertinent books and records of the SEBNA and

SEBWF receiverships, and for the FDIC-Receiver to account for all assets of the receiverships, in order to ascertain whether improper payments have been made by the FDIC-Receiver.

72. The Plaintiffs have made repeated demands upon the FDIC-Receiver for such accountings. The FDIC-Receiver has belatedly produced incomplete reports and records which not only fail to comply with the requirements of 12 U.S.C. § 1821(d)(15)(A), but also are incomplete and misleading in several respects which are relevant and material to a determination of the amount owed to the Plaintiffs.

WHEREFORE, Plaintiffs request that the Court conduct an accounting of the SEBNA and SEBWF receiverships, and pending completion of the same that the FDIC-Receiver be directed to produce all pertinent books, records and assets of the SEBNA and SEBWF receiverships including, without limitation, all reports prepared by the FDIC-Receiver in accordance with 12 U.S.C. §1821(d)(15)(A) and Section 212(d)(15)(A) of FIRREA.

COUNT VII
Restitution To Prevent Unjust Enrichment
(Use of Artwork)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

73. This is an action for recovery of damages against the FDIC-Receiver seeking restitution to prevent unjust enrichment.

74. Prior to September 19, 1991, SEBNA and SEBWF possessed, utilized and/or controlled, certain artwork owned by and belonging to SEBC (the "Artwork") which Artwork had a value in excess of four million dollars. The Artwork was displayed by SEBNA and SEBWF at their corporate headquarters and at multiple branch bank sites throughout the State of Florida. At all times material, SEBNA and SEBWF knowingly and voluntarily accepted, received and otherwise retained a pecuniary benefit from their use, possession and/or control of this Artwork. At the time of the seizure of SEBNA and SEBWF by the OCC, their use of the Artwork and the value of such use was a matter of public record and was reflected in SEBNA and SEBWF's records.

75. Fundamental principles of equity dictate that the Trustee be duly compensated for the reasonable value of SEBNA and SEBWF's use, possession and control of the aforementioned Artwork. To permit SEBNA and SEBWF's use of said property to go without just compensation to SEBC would unjustly enrich both SEBNA and SEBWF at SEBC's expense, resulting in an inequitable windfall to SEBNA and SEBWF.

76. The fair rental value of the Artwork during the period of its use by SEBNA and SEBWF is not readily ascertainable by the Trustee because all pertinent records reflecting this information are in the exclusive possession and/or control of the FDIC-Receiver. Upon information and belief, the fair rental value of the Artwork is not less than $50,770.66, which is the amount SEBC and SEBNA and SEBWF agreed was the fair rental value commencing January 1, 1991.

77. As part of his proofs of claim, the Trustee duly demanded compensation for SEBNA's and SEBWF's utilization of the property referenced above, but the FDIC-Receiver has failed or otherwise refused to comply with such demand.

WHEREFORE, the Trustee requests that this Court enter a judgment requiring that the FDIC-Receiver pay restitution for all monies due and owing SEBC for SEBNA and SEBWF's use, possession and control of SEBC's property together with costs, interest and any other relief this Court deems just and proper.

COUNT VIII
Breach of Contract
(Use of Artwork)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 and 74 as though fully set forth herein.

78. This is an action brought by the Trustee for breach of contract for which the Trustee is entitled to damages against the FDIC-Receiver.

79. Prior to September 19, 1991, upon information and belief, SEBNA and SEBWF entered into various written and/or oral contracts with SEBC for the use and display of the Artwork owned by and belonging to SEBC. In particular, prior to September 19, 1991, and in accordance with these contracts, the Artwork was displayed by SEBNA and SEBWF at their corporate headquarters and at multiple branch bank sites throughout the State of Florida.

80. Upon information and belief, SEBNA and SEBWF breached their written and/or oral contracts with SEBC for the use of this Artwork including, without limitation, a written lease for the use of such Artwork for the period from January 1, 1991 to September 19, 1991, by failing to make payments to SEBC as agreed. The Trustee is able to attach as Exhibit "F" a copy of a written contract dated as of January 2, 1991 governing SEBNA's use of the Artwork for the period subsequent to January 1, 1991. To the extent other written contracts exist, they are in the custody and control of the FDIC. Upon information and belief, SEBNA made certain monthly lease payments for such Artwork to SEBC under the contract attached hereto as Exhibit "F". However, SEBC's records fail to reflect actual receipt of rental for the months of June, July and August, 1991 in the amount of $50,770.66 per month, plus sales tax. Additionally, SEBC's records fail to reflect any payments made by SEBNA or SEBWF for their use of the Artwork under other written and/or oral contracts prior to January 1, 1991.

81. As part of his proofs of claim, the Trustee duly demanded SEBNA and SEBWF's performance under the written and/or oral contracts, but the FDIC-Receiver has failed or otherwise refused to comply with such demand.

82. All conditions precedent to SEBNA and SEBWF's obligation to pay SEBC the indebtedness due pursuant to the written and/or oral contracts, and the Trustee's right to bring and maintain this action, have been waived, excused or have occurred.

83. As a result of the aforementioned defaults, it has become necessary for the Trustee to retain the legal services of the undersigned attorneys to collect said

indebtedness, and he has agreed to pay said attorneys a reasonable fee for their services. The FDIC-Receiver is liable for payment of all reasonable attorneys' fees and costs incurred by the Trustee in the prosecution of this action.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages against the FDIC-Receiver plus all applicable interest, reasonable attorneys' fees and costs incurred by the Trustee in the prosecution of this action, and grant such other and further relief as this Court deems just and proper.

COUNT IX
Restitution To Prevent Unjust Enrichment
(Use of Aircraft)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

84. Financial Carriers files this action seeking restitution to prevent unjust enrichment.

85. Prior to September 19, 1991, SEBNA and SEBWF possessed, utilized and/or controlled certain aircraft property owned by and belonging to Financial Carriers (the "Aircraft"). SEBNA, SEBWF and their subsidiaries were the primary and almost exclusive users of the Aircraft owned by Financial Carriers. At all times material, SEBNA and SEBWF knowingly and voluntarily accepted, received and otherwise retained a pecuniary benefit from Financial Carriers' use, possession and/or control of the Aircraft as well as the services provided by employees of Financial Carriers who maintained, serviced and piloted the Aircraft. At the time of the seizure of SEBNA and SEBWF by the OCC, SEBNA and SEBWF's use of the Aircraft and

pecuniary gain from such use was a matter of public record and was reflected in SEBNA and SEBWF's records.

86. Fundamental principles of equity dictate that Financial Carriers be duly compensated for the reasonable value of SEBNA and SEBWF's use, possession and control of the Aircraft and incidental expenses of the Aircraft. To permit SEBNA and SEBWF's use of said property to go without just compensation to SEBC would unjustly enrich SEBNA and SEBWF at Financial Carrier's expense, resulting in an inequitable windfall to SEBNA and SEBWF.

87. The fair rental value of the aforementioned property during the period of its use by SEBNA, SEBWF and their subsidiaries is not readily ascertainable by Financial Carriers because, upon information and belief, the pertinent records reflecting this information are in the exclusive possession and/or control of the FDIC-Receiver.

88. As part of its proofs of claim, Financial Carriers duly demanded compensation for SEBNA and SEBWF's utilization of the property referenced above, but the FDIC-Receiver has failed or otherwise refused to comply with such demand.

WHEREFORE, Financial Carriers requests that this Court enter a judgment requiring that the FDIC-Receiver pay restitution for all monies due and owing to Financial Carriers for SEBNA and SEBWF's use, possession and control of Financial Carriers' Aircraft together with costs, interest and any other relief this Court deems just and proper.

COUNT X
Breach of Contract
(Use of Aircraft)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 and 85 as though fully set forth herein.

89. This is an action for breach of contract for which Financial Carriers is entitled to recover damages against the FDIC- Receiver.

90. Prior to September 19, 1991, upon information and belief, SEBNA and SEBWF entered into various written and/or oral contracts with Financial Carriers for the use of the Aircraft owned by and belonging to Financial Carriers. In particular, prior to September, 1991, SEBNA, and SEBWF and their subsidiaries were the primary and almost exclusive users of certain aircraft owned by Financial Carriers.

91. Upon information and belief, SEBNA and SEBWF breached their written and/or oral contracts with Financial Carriers for the use of the Aircraft by failing to make payments to Financial Carriers as agreed. To the extent written contracts exist they are in the custody and control of the FDIC.

92. All conditions precedent to SEBNA and SEBWF's obligation to pay Financial Carriers the indebtedness due pursuant to the written and/or oral contracts, and Financial Carriers' right to bring and maintain this action, have been waived, excused or have occurred.

93. As a result of the aforementioned defaults, it has become necessary for Financial Carriers to retain the legal services of the undersigned attorneys to collect said indebtedness, and it has agreed to pay said attorneys a reasonable fee for their services. The FDIC-Receiver is liable for payment of all reasonable attorneys' fees and costs incurred by Financial Carriers in the prosecution of this action.

WHEREFORE, Financial Carriers requests that this Court enter a judgment for damages against the FDIC-Receiver plus all applicable interest, reasonable attorneys' fees and costs incurred by Financial Carriers in the prosecution of this action, and grant such other and further relief as this Court deems just and proper.

COUNT XI
Restitution To Prevent Unjust Enrichment (Intercompany Advances, Florida Intangible Taxes, Income Tax Refunds)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as through fully set forth herein.

94. The Trustee brings this action for recovery of damages against the FDIC-Receiver seeking restitution to prevent unjust enrichment.

95. Prior to September 19, 1991, SEBNA was indebted to SEBC for, among other items not specifically described, the following debts:

(a) intercompany advances SEBC paid to SEBNA which were reflected as loans to SEBNA to facilitate SEBNA's operations;

(b) $24,647 paid to SEBNA by SEBC in connection with SEBNA's payment of Florida intangible taxes;

(c) any and all tax refunds SEBNA and/or its subsidiaries have received based on losses funded by SEBC; and,

(d) other amounts SEBNA owes Plaintiffs which are not readily ascertainable because the FDIC is in exclusive possession of the documents which would disclose these amounts.

96. At all times material, SEBNA knowingly and voluntarily accepted, received and otherwise retained a pecuniary benefit from the aforementioned moneys it owed to SEBC.

97. Fundamental principles of equity dictate that SEBC be reimbursed and otherwise compensated for the bona fide debts specified above. To permit SEBNA to be released from its legal obligation to repay SEBC for these debts would unjustly enrich SEBNA at SEBC's expense, resulting in an inequitable windfall to the FDIC-Receiver.

98. As part of his proofs of claim, the Trustee duly demanded reimbursement for the items referenced above, but the FDIC-Receiver has failed or otherwise refused to comply with such demand.

WHEREFORE, the Trustee requests that this Court enter a judgment requiring that the FDIC-Receiver pay restitution for all monies due and owing to the Trustee for the outstanding indebtedness described above.

COUNT XII
Restitution to Prevent Unjust Enrichment (Use and Occupancy of Real Estate Owned or leased by SEPI)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

99. This is an action for recovery of damages against the FDIC-Receiver seeking restitution to prevent unjust enrichment.

100. Prior to September 19, 1991, SEBNA and/or SEBWF knowingly and voluntarily used, occupied and retained the benefit from using various parcels of real property owned or leased by SEPI without compensating SEPI. Because many of the pertinent records relating to the real property interests of SEPI are in the possession and/or control of the FDIC-Receiver, SEPI is unable at this time to identify which of its property was used and occupied by SEBWF without compensating SEPI. SEPI was able to determine that SEBNA used the following real property owned or leased by SEPI without compensating SEPI:

(a) Coral Way Drive In. Prior to September, 1991, SEBNA occupied and utilized this property and its improvements for a drive-in facility in connection with the Coral Way Banking Center located at 1699 Coral Way, Miami, Florida. SEBNA failed to compensate SEPI, the owner of the property, for its occupancy and utilization thereof.

(b) Coral Way Parking Lot. Since prior to September, 1991, SEBNA occupied

and utilized as a parking lot certain property in connection with the Coral Way Banking Center located at 1699 Coral Way, Miami, Florida without compensating SEPI, which had leased the property from an unrelated third party. Upon information and belief, SEBNA paid some rental and expenses due under the lease directly to the third party landlord on behalf of SEPI. However, the Trustee is entitled to compensation to the extent that the fair market value of SEBNA's use, occupancy and control exceeds the amount SEBNA paid to the landlord.

(c) Daytona Beach Banking Center. Since prior to September, 1991, SEBNA utilized this property and its improvements as the Daytona Beach Banking Center without compensating SEPI, the owner of the property.

(d) Davie Boulevard Banking Center. This land has been leased by SEPI from an unrelated third party since April 1981. Upon information and belief, the banking center building and other improvements were built by SEPI. Prior to September, 1991, SEBNA utilized this property and improvements for use as a banking center pursuant to a sublease between SEPI (as sublessor) and SEBNA (as sublessee). Upon information and belief, all of the amounts due under that sublease were paid through the expiration of the lease on April 15, 1991. However, SEBNA continued

to occupy and use this property and the improvements from April 16, 1991 through September 19, 1991, as a month-to-month and/or holdover tenant without compensating SEPI, the owner of the property.

(e) Tampa City Center Banking Center. This banking center is comprised of approximately 21,000 square feet of office space in the lobby and the ground floor of the one Tampa City Center Building located at 201 North Florida Street, Tampa, Florida. This property has been leased by SEPI (as tenant) from GTE Realty Corp. (as landlord) since November 2, 1981 pursuant to the Agreement of Lease dated September 29, 1982. From February 1, 1982 through January 31, 1991, Southeast Bank of Tampa (which was merged into SEBNA) occupied this property for use as a banking center pursuant to a sublease agreement dated August 7, 1981 between Southeast Bank of Tampa (as sublessee) and SEPI (as sublessor). However, SEBNA continued to occupy and use this property and the improvements from January 31, 1991 through September 19, 1991, as a month-to-month and/or holdover tenant, without compensating SEPI. SEPI is entitled to compensation to the extent that the fair market value of SEBNA's use, occupancy, and control of the land and the improvements from January 31, 1991 through September 19, 1991 exceeds the amount, if any, paid by SEBNA to the landlord.

(f) Dunedin Parking Lot. This property has been leased by SEPI (as tenant) from Caladesi Auto Sales and Service Company (as landlord) since April 1974 pursuant to a lease agreement dated December 1, 1972. This lease was assigned to SEPI pursuant to an assignment of lease dated April 29, 1974. Since prior to September, 1991, SEBNA has used and occupied this property as a parking lot without compensating SEPI. Upon information and belief, SEBNA paid certain rentals and expenses due under the lease to the landlord. SEPI is entitled to compensation to the extent that the fair market value of SEBNA's use, occupancy and control of this property exceeds the amount paid by SEBNA to the landlord.

(g) Winter Park Banking Center. This property and the banking center facilities located thereon have been owned by SEPI since May of 1982. Since prior to September, 1991, SEBNA has occupied this property and its improvements and used them as the Winter Park Banking Center without compensating SEPI. SEPI is entitled to the fair market value of SEBNA's use, occupancy and control of this property and the improvements thereon.

(h) Hollywood Banking Center Parking Lot. This property has been leased by SEPI (as tenant) from Hollywood Buildings, Inc. (as landlord) since May 1,

1971 pursuant to a lease agreement dated April 30, 1971. Since prior to September, 1991, SEBNA has occupied this property and used it as a parking lot in connection with the Hollywood Banking Center without compensating SEPI. Upon information and belief, SEBNA paid certain rental and expenses due under the lease directly to the landlord. SEPI is entitled to compensation to the extent that the fair market value of SEBNA's use, occupancy and control of this property exceeds the amount paid by SEBNA to the landlord.

(i) Unidentified Realty Owned or Leased by SEPI. Because all pertinent records relating to the real property interests of SEPI are in the exclusive possession and/or control of the FDIC, it is impossible at this time to identify what, if any, other real property interests are owned by SEPI. SEPI is entitled to compensation for SEBNA's use and occupancy of any such real property.

101. At the time of the seizure of SEBNA and/or SEBWF by the OCC, SEBNA and SEBWF'S use of the SEPI property was a matter of public record and was reflected in the records of SEBNA and SEBWF.

102. Fundamental principles of equity dictate that SEPI be duly compensated for the reasonable value of SEBNA and/or SEBWF'S use, possession and control of the aforementioned property and be duly reimbursed for taxes and other expenses relating to the aforementioned property to the extent these expenses were paid by SEPI or are due

and owing. To permit SEBNA's and SEBWF's use of said property to go without just compensation to SEPI would unjustly enrich SEBNA and SEBWF at SEPI's expense, resulting in an inequitable windfall to the FDIC-Receiver.

103. After September of 1991, the FDIC-Receiver has knowingly and voluntarily used, occupied, and/or allowed third parties to occupy, the aforementioned real property, and has retained the benefit from the same without compensating SEPI. Fundamental principles of equity dictate that SEPI be duly compensated for the reasonable value of the FDIC-Receiver's use, possession and control of the property, and/or that the FDIC-Receiver, as a result of its failure to reasonably or timely repudiate leases relating to the aforementioned properties, be deemed to have assumed all of SEPI's future tenant obligations relating to these properties.

104. As part of its proofs of claim, SEPI duly demanded compensation for the utilization of property referenced above, but the FDIC-Receiver failed or otherwise refused to comply with such demand.

WHEREFORE, SEPI requests that this Court enter a judgment requiring that the FDIC-Receiver pay restitution for all monies due and owing to the Trustee, on behalf of SEPI, for SEBNA, SEBWF and the FDIC's use, possession and control of property leased or owned by SEPI together with costs, interest and any other relief this Court deems just and proper.

COUNT XIII
Breach of Contract
(Use and Occupancy of Real Estate Owned or leased by SEPI)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 and 100 as though fully set forth herein.

105. This is an action for breach of contract for which SEPI is entitled to damages against the FDIC-Receiver.

106. Prior to September 19, 1991, upon information and belief, SEBNA and/or SEBWF entered into various written and/or oral contracts with SEPI for the use and occupancy of the real property owned or leased by SEPI partially described with specificity in paragraph 100 above without compensating SEPI.

107. Upon information and belief, SEBNA and/or SEBWF breached their written and/or oral contracts with SEPI for the use and occupancy of the aforementioned real property by failing to make payments to SEPI as agreed. To the extent written contracts exist, they are in the custody and control of the FDIC.

108. All conditions precedent to SEBNA and/or SEBWF's obligation to pay SEPI the indebtedness due pursuant to the written and/or oral contracts, and SEPI's right to bring and maintain this action, have been waived, excused or have occurred.

109. As a result of the aforementioned defaults, it has become necessary for SEPI to retain the legal services of

the undersigned attorneys to collect said indebtedness, and SEPI has agreed to pay said attorneys a reasonable fee for their services. The FDIC-Receiver is liable for payment of all reasonable attorneys' fees and costs incurred by SEPI in the prosecution of this action.

WHEREFORE, SEPI requests that this Court enter a judgment for damages against the FDIC-Receiver plus all applicable interest, reasonable attorneys' fees and costs incurred by SEPI in the prosecution of this action, and grant such other and further relief as this Court deems just and proper.

COUNT XIV
Restitution to Prevent Unjust Enrichment
(Use and Occupancy of Real Estate Owned by SEBC)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

110. The Trustee brings this action against FDIC-Receiver for restitution to prevent unjust enrichment.

111. Prior to September 19, 1991, SEBNA and/or SEBWF knowingly and voluntarily used, occupied and retained the benefit from using the real property owned or leased by SEBC, without compensating SEBC. Because many of the pertinent records relating to the real property interests of SEBC are in the possession and/or control of the FDIC, SEBC is currently unable to identify which property was used and occupied by SEBWF without compensating SEBC. SEBC was able to determine that SEBNA used the following real property without compensating SEBC:

(a) Dadeland Drive-In. Prior to September, 1991, SEBNA utilized this property and its improvements for a drive-in facility in connection with the Dadeland Banking Center located at 7190 S.W. 88th Street, Miami, Florida. SEBNA failed to compensate SEBC, the owner of the property, for its utilization thereof.

(b) West Flagler Banking Center. This land has been leased by Popular Bancshares Corporation (which entity was merged into SEBC), as tenant, from Edward C. Tietig, trustee, as landlord, pursuant to a lease dated October 22, 1978. Upon information and belief, the banking center building and other improvements located on the property were built by Popular Bancshares Corporation and are owned by SEBC. Prior to September, 1991, SEBNA utilized this property without compensation to SEBC. Upon information and belief, SEBNA paid certain rentals and expenses due under the lease directly to the landlord on behalf of SEBC. SEBC is entitled to compensation to the extent that the fair market value of SEBNA's use, occupancy and control of this property together with the improvements exceeds the amount paid by SEBNA to the landlord.

(c) Unidentified Realty Owned or Leased by SEBC. Because all pertinent records relating to the real property interests of SEPI are in the exclusive possession and/or

control of the FDIC, it is impossible at this time to identify what, if any, other real property interests are owned by SEBC. SEBC is entitled to compensation for SEBNA's use and occupancy of any such real property.

112. SEBNA and/or SEBWF's use of the SEBC property was a matter of public record and was reflected in the records of SEBNA and/or SEBWF.

113. Fundamental principles of equity dictate that SEBC be duly compensated for the reasonable value of SEBNA and SEBWF's use, possession and control of the aforementioned property. To permit SEBNA and SEBWF's use of said property to go without just compensation to SEBC would unjustly enrich SEBNA and SEBWF at SEBC's expense, resulting in an inequitable windfall to the FDIC-Receiver.

114. After September 19, 1991, the FDIC-Receiver has knowingly and voluntarily used, occupied, and/or allowed third parties to occupy the aforementioned properties, and has retained the benefit of the same without compensating the Trustee. Fundamental principles of equity dictate that the Trustee be duly compensated for the reasonable value of the FDIC-Receiver's use, possession and control of the property, and/or that the FDIC-Receiver, as a result of its failure to reasonably and timely repudiate leases relating to the aforementioned properties, be deemed to have assumed all of SEBC's future tenant obligations relating to these properties.

115. As part of his proofs of claim, the Trustee duly demanded compensation for the utilization of property

referenced above, but the FDIC-Receiver failed or otherwise refused to comply with such demand.

WHEREFORE, the Trustee requests that this Court enter a judgment requiring that the FDIC-Receiver pay restitution for all monies due and owing to the Trustee for SEBNA, SEBWF and the FDIC's use, possession and control of SEBC's property together with costs, interest and any other relief this Court deems just and proper.

COUNT XV
Breach of Contract
(Use and Occupancy of Real Estate Owned by SEBC)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 and 111 as though fully set forth herein.

116. This is an action for breach of contract for which the Trustee is entitled to damages against the FDIC-Receiver.

117. Prior to September 19, 1991, upon information and belief, SEBNA and/or SEBWF entered into various written and/or oral contracts with SEBC for the use and occupancy of the real property owned or leased by SEBC and partially described with specificity in paragraph 111 above.

118. Upon information and belief, SEBNA and/or SEBWF breached their written and/or oral contracts with SEBC for the use and occupancy of the aforementioned real property by failing to make payments to SEBC as agreed. To the extent written contracts exist, they are in the custody and control of the FDIC.

119. All conditions precedent to SEBNA and SEBWF's obligation to pay SEBC the indebtedness due pursuant to the written and/or oral contracts, and the Trustee's right to bring and maintain this action, have been waived, excused or have occurred.

120. As a result of the aforementioned defaults, it has become necessary for the Trustee to retain the legal services of the undersigned attorneys to collect said indebtedness, and he has agreed to pay said attorneys a reasonable fee for their services. The FDIC-Receiver is liable for payment of all reasonable attorneys' fees and costs incurred by the Trustee in the prosecution of this action.

WHEREFORE, the Trustee requests that this Court enter a judgment for damages against the FDIC-Receiver plus all applicable interest, reasonable attorneys' fees and costs incurred by the Trustee in the prosecution of this action, and grant such other and further relief as this Court deems just and proper.

COUNT XVI
Declaratory Relief As To Contribution Or Indemnification
(Potential Claims Of Or Against Employees, Directors, Officers And Unknown Others)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

121. This is an action for declaratory judgment pursuant to 28 U.S.C. §2201 to determine the relative rights of, and resolve an actual and exiting controversy between, Plaintiffs and the FDIC-Receiver.

122. Prior to and at the time the FDIC-Receiver was appointed Receiver of SEBNA and SEBWF, SEBNA and SEBWF terminated certain of their employees, officers and directors. These former employees, officers and directors have asserted claims against SEBC's estate for various severance payments and other amounts due and owing as a result of these terminations. Specifically, claims have been asserted against SEBC's estate by former officers and directors, including without limitation, Charles Zwick, Charles Tower, Jr., Robert L. Schoen, Anthony Crowley, Samuel Gentry, Robert Hunter, Carlos Migoya, Michael Quackenbush, Kenneth Sheridan, Marc Lipsitz and Barry Lawson in respect of benefits and other amounts to which these individuals were entitled under Employment Agreements with SEBNA. These individuals asserted claims against SEBC which had guaranteed the purported obligations of SEBNA to these individuals. As SEBNA was the employer of these officers and/or directors, it has the primary responsibility to pay any amounts due and owing these individuals and/or to indemnify or reimburse the Trustee for any amounts which SEBC's estate is required to pay.

123. Former directors and officers of SEBC, SEBNA and SEBWF have also sought or may, at some time in the future, attempt to seek indemnification from SEBC's estate in connection with actions which have been or may be filed against them arising from their roles as directors and/or officers of SEBNA and SEBWF.

124. Finally, certain acts undertaken on behalf of or by SEBNA and SEBWF have resulted in and may result in claims filed against SEBC's estate by third parties and unknown others. Specifically, claims have been filed against SEBC by Jimmy Hatcher, Red Carpet Corp. and 5-H Corp.

in the aggregate amount of $9 million for damages allegedly suffered as a result of these claimants' loans with SEBNA. Moreover, other third parties have asserted claims against SEBC's estate for goods and services provided to SEBNA and/or SEBWF. While the Trustee has objected to such claims, to the extent they are allowed, they remain the primary obligation of SEBNA and/or SEBWF.

125. Absent a declaratory judgment that the FDIC-Receiver is liable to the Trustee for indemnification, contribution and/or reimbursement for these present and potential claims, SEBC's estate alone will be responsible and liable for these claims and potential actions which are partially if not solely the responsibility of SEBNA and SEBWF.

126. There is an actual and substantial controversy between the Trustee of SEBC and the FDIC-Receiver regarding responsibility for these third party claims and other potential claims in the future brought by employees of SEBNA and SEBWF, officers and directors of SEBNA, SEBWF and SEBC, and unknown others.

127. As part of his proofs of claim, the Trustee duly demanded compensation for potential claims of or against former employees, directors and officers of SEBNA and SEBWF, and unknown others, but the FDIC-Receiver failed or otherwise refused to comply with such demand.

128. By virtue of the provisions of FIRREA, this claim against the FDIC-Receiver must be filed at this time to determine the respective rights of the parties as to existing claims and in the event future claims are brought against SEBC's estate.

WHEREFORE, the Trustee requests that this Court enter a judgment declaring that:

(a) the FDIC-Receiver is liable to the Trustee for indemnification, contribution and/or reimbursement for claims asserted against the SEBC estate by former employees, officers, and directors of SEBNA and SEBWF in connection with their termination, not including claims relating to employee benefit issues;

(b) the FDIC-Receiver is liable to the Trustee for indemnification, contribution and/or reimbursement for claims asserted against the SEBC estate by past or present officers and/or directors of SEBNA and SEBWF in connection with the payment of claims filed against those officers and directors arising from their roles as officers and directors;

(c) the FDIC-Receiver is liable to the Trustee for indemnification, contribution and/or reimbursement for claims asserted against it by past or present officers and/or directors of SEBC, and unknown others, as a result of actions by SEBNA and SEBWF;

(d) the FDIC-Receiver is liable to the Trustee to the extent the Trustee incurs or expends legal fees and expenses in defense of employee, officer and/or director claims of the type listed above; and,

(e) the Trustee is entitled to such other relief as this Court deems just and proper.

COUNT XVII
Declaratory Relief
(Indemnification For Claims Against The Estate Of SEPI Relating to Real Property)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

129. This is an action for declaratory judgment pursuant to 28 U.S.C. §2201 to determine the relative rights of, and resolve an actual and existing controversy between Plaintiffs and the FDIC-Receiver.

130. Prior to September 19, 1991, SEPI executed various assignments of real property leases in favor of SEBNA and SEBWF wherein SEPI remains liable for the performance of obligations of SEBNA and SEBWF under the leases. If SEBNA and/or SEBWF default on such leases, SEPI may be liable to third parties. A partial listing of these leases is attached hereto as Exhibit "G".

131. Because many of the pertinent records relating to the real property interests of SEPI are in the possession and/or control of the FDIC, it is impossible at this time to identify what, if any, other assignments of real property leases in favor of SEBNA and SEBWF were executed by SEPI wherein SEPI remains liable for the performance of obligations of SEBNA and SEBWF under the leases.

132. Absent a declaratory judgment that the FDIC-Receiver will be liable to SEPI for indemnification,

contribution and/or reimbursement for liability under the aforementioned leases, SEPI alone will be responsible and liable for such defaults which are partially if not solely the responsibility of SEBNA and SEBWF.

133. There is an actual and substantial controversy between the Trustee and the FDIC-Receiver regarding responsibility for potential claims arising from the assignment of leases SEPI executed for the benefit of SEBNA and SEBWF.

134. As part of his proofs of claim, the Trustee duly demanded compensation for potential claims arising from the aforementioned assignments of leases, but the FDIC-Receiver failed or otherwise refused to comply with such demand.

135. By virtue of the provisions of FIRREA, this claim against the FDIC-Receiver must be filed at this time to determine the respective rights of the parties in the event future claims are brought against SEPI.

WHEREFORE, the Trustee requests that this Court enter a judgment declaring that the FDIC-Receiver is liable to SEPI for indemnification, contribution and/or reimbursement for any liabilities resulting from the assignment of leases SEPI executed for the benefit of SEBNA and SEBWF.

COUNT XVIII
Declaratory Relief
(Claims Against The Estate Of SEBC)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

136. This is an action for declaratory judgment pursuant to 28 U.S.C. §2201 to determine the relative rights of, and resolve an actual and existing controversy between Plaintiffs and the FDIC-Receiver.

137. Upon information and belief, prior to September 19, 1991, SEBC executed various guaranties assuring third parties of the performance of various contracts or satisfaction of obligations by SEBNA, SEBWF and/or their subsidiaries. One of these guaranties included a guaranty executed in favor of Sears Mortgage Company pertaining to the sale by Southeast Mortgage Co. ("SEMCO") of its residential mortgage portfolio to Sears. If SEBNA, SEBWF and/or their subsidiaries default on such contracts and/or obligations, SEBC may be liable to third parties as guarantor of such duties and/or obligations of SEBNA and SEBWF. Substantially all of the guaranties SEBC executed for the benefit of SEBNA, and SEBWF and/or their subsidiaries are in the exclusive possession and/or control of the FDIC-Receiver.

138. Because substantially all of the pertinent records relating to the business affairs of SEBC remain in the exclusive possession and/or control of the FDIC, it is impossible at this time to identify what, if any, other guaranties were executed by SEBC for the benefit of or in favor of SEBNA and/or SEBWF.

139. Absent a declaratory judgment that the FDIC-Receiver will be liable to the Trustee for indemnification, contribution and/or reimbursement for liability on the guarantee, SEBC's estate alone will be responsible and liable for such defaults which are partially if not solely the responsibility of SEBNA and SEBWF.

140. There is an actual and substantial controversy between the Trustee and the FDIC-Receiver regarding responsibility for potential claims arising from guaranties SEBC executed for the benefit of SEBNA, SEBWF and/or their subsidiaries.

141. As part of his proofs of claim, the Trustee duly demanded compensation for potential claims arising from the aforementioned guaranties, but the FDIC-Receiver failed or otherwise refused to comply with such demand.

142. By virtue of the provisions of FIRREA, this claim against the FDIC-Receiver must be filed at this time to determine the respective rights of the parties.

WHEREFORE, the Trustee requests that this Court enter a judgment declaring that the FDIC-Receiver is liable to the Trustee for indemnification, contribution and/or reimbursement for any liabilities resulting from guaranties SEBC executed on behalf of SEBNA, SEBWF and/or their subsidiaries.

COUNT XIV
Avoidance and Recovery of Preference(s)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

143. This is an action for avoidance and recovery of preferences pursuant to Sections 547 and 550 of the Bankruptcy Code, 11 U.S.C. §§ 547, 550. Alternatively to, and conjunctively with, those jurisdictional bases described in paragraph 7 hereof, jurisdiction over the subject matter is predicated upon 28 U.S.C. § 1334(b), and venue is proper in this District pursuant to 28 U.S.C. § 1409(a).

144. Upon information and belief, at various times within one year prior to September 20, 1991, SEBC made or was induced to make one or more transfers of various interests in property to or for the benefit of SEBNA and/or SEBWF, for or on account of antecedent debt owed to SEBNA and/or SEBWF. The transfer(s) were made at a time while SEBC was insolvent or presumptively insolvent pursuant to 11 U.S.C. § 547(f), and had the effect of enabling SEBNA and SEBWF to receive more than it would receive if such transfer(s) had not been made and SEBNA and/or SEBWF received payment of the Debt as provided under Chapter 7 of the Bankruptcy Code. The Trustee is unable to specifically identify these transfers at this time because, upon information and belief, the pertinent records reflecting this information are in the exclusive possession and/or control of the FDIC-Receiver.

145. As a result of the foregoing transfer(s), the Trustee is entitled to recover for the benefit of the estate of the property so transferred or, if the Court so orders, the value of the property, from the FDIC-Receiver.

146. As part of his proofs of claim, the Trustee duly included the recovery of transfers determined to be preferences, but the FDIC-Receiver has failed or otherwise refused to allow such claim(s).

WHEREFORE, the Trustee requests that the Court enter a judgment avoiding the transfer(s) described in this Count, and directing that the Trustee recover the property so transferred or, in the alternative, the value of said property.

COUNT XX
Avoidance and Recovery of Fraudulent Transfer(s)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

147. This is an action for avoidance and recovery of fraudulent transfers pursuant to Sections 544, 548 and 550 of the Bankruptcy Code, 11 U.S.C. §§ 544, 548, 550. Alternatively to, and conjunctively with, those jurisdictional basis described in paragraph 7 hereof, jurisdiction over the subject matter is predicated upon 28 U.S.C. § 1334(b), and venue is proper in this District pursuant to 28 U.S.C. § 1409(a).

148. Upon information and belief, at various times within one year prior to September 20, 1991, or such longer period as may obtain under applicable state law, SEBC made or was induced to make one or more transfers of various interest in property to SEBNA and SEBWF, for which it received less than a reasonably equivalent value in exchange. The Trustee is unable to specifically identify these transfers at this time because, upon information and belief, the pertinent records reflecting this information are in the exclusive possession and/or control of the FDIC-Receiver.

149. Upon information and belief, at the time and as a result of such transfer(s), SEBC was engaged in business or a transaction, or was about to engage in business or a transaction, for which the property remaining with SEBC was an unreasonably small capital, or in the alternative, SEBC intended to incur or believed it would incur debts that would be beyond its ability to pay as they matured.

150. At the time of the filing of the Chapter 7 case, SEBC had one or more creditors holding allowable unsecured claims who were creditors at the time of the foregoing transfer(s).

151. As part of his proofs of claim, the Trustee duly included the recovery of transfers determined to be constructively fraudulent, but the FDIC-Receiver has failed to otherwise refused to allow such claim(s).

WHEREFORE, the Trustee requests that the Court enter a judgment avoiding the transfer(s) described in this Count, and directing that the Trustee recover the property so transferred or, in the alternative, the value of said property.

COUNT XXI
Avoidance and Recovery of Fraudulent Transfer Pursuant to § 548
(The SEMCO Transfer)

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 of the Complaint as though fully set forth herein.

152. This is an action for avoidance and recovery of fraudulent transfers pursuant to Sections 548 and 550 of the Bankruptcy Code, 11 U.S.C. §§ 548, 550. Alternatively to, and conjunctively with, those jurisdictional bases described in paragraph 7 hereof, jurisdiction over the subject matter is predicated upon 28 U.S.C. § 1334(b), and venue is proper in this District pursuant to 28 U.S.C. § 1409(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H).

153. At all relevant times prior to December 31, 1990, SEBC owned 500 shares of the capital stock of Southeast Mortgage Company ("SEMCO"), which constituted all of the outstanding capital stock of SEMCO. SEMCO's business involved the origination and servicing of residential mortgages, with the ultimate objective of assembling pools of mortgages for sale in the secondary market.

154. On or about December 31, 1990, SEBC transferred its 500 shares of SEMCO capital stock to SEBNA (the "SEMCO Transfer"). The transaction was structured as a "contribution to capital," by which SEBC transferred all of the common stock of one wholly-owned subsidiary, SEMCO, to another subsidiary, SEBNA.

155. At the time of the SEMCO Transfer, the SEMCO stock had a book value of $14,491,561. Because of SEMCO's profitable operating history and the substantial income historically generated through its operations, the fair market value of the SEMCO stock far exceeded book value.

156. SEBC did not receive reasonably equivalent value in exchange for the SEMCO Transfer. The agreement executed by SEBC and SEBNA in connection with this transaction indicates, as alleged above, that the SEMCO Transfer was treated as a "contribution to capital," and lists no consideration for said contribution paid, promised or furnished in exchange for the SEMCO stock.

157. For a period of at least several months prior to the SEMCO Transfer the Federal Reserve Bank of Atlanta (the "Federal Reserve"), and presumably other regulatory agencies involved in the oversight of both SEBC and SEBNA, including the FDIC and the OCC, had become

increasingly concerned over what it perceived to be the impaired capital position of SEBC. As a result of this concern, SEBC and the Federal Reserve entered into a Memorandum of Understanding, known generically in the banking industry and referred to hereafter as an "MOU," on or about July 30, 1990.

158. As reflected by the language and, indeed, its very existence, the MOU represented a recognition by the Federal Reserve, as the principal federal regulatory body exercising control over bank holding companies, and by each and every member of SEBC's board of directors, that the capital of SEBC was unreasonably small to meet its ongoing and anticipated business obligations. This same ongoing and pervasive regulatory oversight of and involvement in the affairs of both SEBC and SEBNA made it increasingly likely, both at the time of the SEMCO Transfer and with each passing day thereafter, that the OCC would declare SEBNA insolvent and appoint the FDIC as receiver.

159. In the months following the SEMCO Transfer, the capital position of SEBC continued to deteriorate, as did the liquidity of SEBNA. This latter circumstance caused SEBNA to begin borrowing on a demand basis, with increasing frequency and amount, from the discount window of the Federal Reserve in order to meet its working capital needs.

160. On September 19, 1991, the Federal Reserve demanded immediate repayment from SEBNA of the entire sum of approximately $568 million then due and outstanding under these discount loans. As a result of SEBNA's illiquidity and consequent inability to make the demanded repayment from funds on hand, the OCC declared SEBNA insolvent and appointed the FDIC as receiver, thereby

rendering worthless the capital stock of SEBNA held by SEBC.

161. At the time of the SEMCO Transfer the impaired financial condition of both SEBC and SEBNA was well-known, and the likelihood that SEBNA would ultimately be declared insolvent and seized by federal regulators was significant. These circumstances exposed SEBC to a significant risk that its entire equity position in SEMCO would be lost as a result of the transfer to SEBNA, as ultimately proved to be the case. For these and other reasons, including the absence of any tangible consideration paid by SEBNA, SEBC failed to receive reasonably equivalent value for its "capital contribution" of the SEMCO stock to SEBNA.

162. As more fully described hereinabove, the SEMCO Transfer is avoidable pursuant to Section 548(a)(2) because (1) it occurred within one year prior to the Debtor's filing of its Chapter 7 petition; (2) the Debtor did not receive reasonably equivalent value as a result of the Transfer; and (3) at the time of the SEMCO Transfer SEBC was engaged or was about to be engaged in business for which its remaining capital was unreasonably small.

163. Pursuant to Section 550(a)(1) of the Bankruptcy Code, 11 U.S.C. § 550(a)(1), the Trustee may recover, for the benefit of the estate, transfers which are avoidable pursuant to Section 548 of the Bankruptcy Code from the initial transferee of the avoidable transfer or from the entity for whose benefit the transfer was made. Accordingly, the FDIC-Receiver is liable to the Trustee as the successor in interest of the initial transferee of the SEMCO stock.

WHEREFORE, the Trustee requests that the Court enter a judgment avoiding the SEMCO Transfer, and directing that the Trustee recover the SEMCO stock together with any dividends or other distributions made since the time of the SEMCO Transfer or, in the alternative, the amount of the value of the SEMCO stock.

COUNT XXII
Avoidance and Recovery of Fraudulent Transfer Pursuant to § 544

Plaintiffs incorporate the allegations contained in paragraphs 1 through 18 and 152 through 163 as though fully set forth herein.

164. This is an action for avoidance and recovery of fraudulent transfers pursuant to Sections 544 and 550 of the Bankruptcy Code, 11 U.S.C. §§ 544, 550. Alternatively to, and conjunctively with, those jurisdictional bases described in paragraph 7 hereof, jurisdiction over the subject matter is predicated upon 28 U.S.C. § 1334(b), and venue is proper in this District pursuant to 28 U.S.C. § 1409(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H).

165. The SEMCO Transfer is avoidable in that it has affected those creditors of SEBC which at all relevant times between the date of the SEMCO Transfer and the Petition Date have held claims against SEBC or its bankruptcy estate.

166. As more fully described hereinabove, the SEMCO Transaction is avoidable pursuant to Section 544(b) and Fla. Stat. § 726.105 because (1) it occurred within the past four years; (2) SEBC did not receive reasonably

equivalent value; and (3) at the time of the transfer SEBC was engaged or about to be engaged in a transaction for which its remaining assets were unreasonably small. Section 544(b) incorporates relevant state fraudulent transfer law. Accordingly,

167. Pursuant to Section 550(a)(1) of the Bankruptcy Code, 11 U.S.C. § 550(a)(1), the Trustee may recover, for the benefit of the estate, transfers which are avoidable pursuant to Section 544 of the Bankruptcy Code from the initial transferee of the avoidable transfer or from the entity for whose benefit the transfer was made. Accordingly, the FDIC-Receiver s liable to the Trustee, as successor in interest of the initial transferee of the SEMCO stock.

WHEREFORE, the Trustee requests that the Court enter a judgment avoiding the SEMCO Transfer, and directing that the Trustee recover the SEMCO stock together with the any dividends or other distributions made since the

time of the SEMCO Transfer or, in the alternative, the amount of the value of the SEMCO stock.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail to: J. CHRISTOPHER KOHN, ROBERT M. HOLLIS, THEODORE R. CARTER, III, MARGARET L. BASKETTE, JAMES J. FAUGHNAN and ANNE M. McCORMICK Attorneys, Commercial Litigation Branch, Civil Division, United States Department Justice, P.O. Box 875, Ben Franklin Station, Washington, D.C. 20044; and L. BRUCE SWIREN, Staff Attorney, Federal Deposit Insurance, Corporation, 5778 South

Semoran Blvd., P.O. Box 7250031, Orlando, Florida 32872-5003 this ____ day of January, 1994.

KENNETH B. ROBINSON

Supreme Court, U.S.
FILED
FEB 12 1997
CLERK

No. 96-939

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., ETC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

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QUESTION PRESENTED

Whether the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, displaced the federal common law doctrine this Court enunciated in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942).

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BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 93 F.3d 750. The order of the district court (Pet. App. 7a-8a) and the report and recommendation of the magistrate judge (Pet. App. 9a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-28a) was entered on July 11, 1996. A petition for rehearing was denied on September 10, 1996. Pet. App. 23a-25a. The petition for a writ of certiorari was

filed on November 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 19, 1991, Southeast Bank, N.A., and Southeast Bank of West Florida (the Banks) were declared insolvent, and the FDIC was appointed as receiver. The following day, the Banks' holding company, Southeast Banking Corporation (SBC), filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On April 28, 1992, petitioner William A. Brandt was confirmed as the trustee for the bankruptcy estate. Pet. App. 33a-36a.

2. After exhausting their administrative remedies under the administrative claims process, see 12 U.S.C. 1821(d)(3)-(13), Brandt and certain SBC affiliates (collectively, petitioners herein) brought suit in the United States District Court for the Southern District of Forida against the FDIC as receiver for the Banks (FDIC-Receiver), the FDIC in its corporate capacity (FDIC-Corporate), and the State of Florida Department of Banking and Finance. Pet. App. 10a. The complaint sought relief on 22 counts. Only Counts VII through XV, which seek restitution and damages from the FDIC-Receiver for the Banks' alleged possession and use of petitioners' artwork, aircraft and real estate, and restitution for intercompany advances allegedly due and owing, are at issue here. Pet. 6 n.6; Pet. App. 16a.

Defendants moved to dismiss these Counts, and the matter was referred by the district court to a magistrate judge, who recommended that the motion be granted. Pet. App. 9a-22a. The magistrate judge determined (*id.* at 16a-17a) that, because the claims reflected in Counts VII through XV were based on

alleged obligations of the Banks that were not recorded in the Banks' books and records, those claims were barred by the common law doctrine enunciated by this Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). The magistrate judge observed that the alleged liabilities were "significant" in volume and "precisely the kinds of 'ordinary' liabilities that are of interest to bank examiners in evaluating the fiscal soundness of a bank." Pet. App. 16a. He concluded, moreover, that "insider dealings" between a parent company and its corporate affiliates are "precisely the type prohibited by *D'Oench* and its statutory counterparts." *Id.* at 17a.

The district court adopted the magistrate judge's report and recommendations, entered judgment in favor of the FDIC (Pet. App. 8a), and certified the case for appellate review under Rule 54(b) of the Federal Rules of Civil Procedure (Pet. App. 29a).

3. The court of appeals affirmed in relevant part. It rejected petitioners' argument that the *D'Oench* doctrine was supplanted by the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. The court explained that that argument was foreclosed by its recent en banc decision in *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank*, 83 F.3d 1317 (11th Cir. 1996), cert. granted and judgment vacated, No. 96-106, (Jan. 21, 1997), which held that "neither FIRREA, nor the Federal Deposit Insurance Act of 1950, preempted the federal common law *D'Oench* doctrine." Pet. App. 4a.

ARGUMENT

1. Petitioners urge the Court to grant certiorari in this case to determine whether the enactment of

FIRREA supplanted further application of the *D'Oench* doctrine. They correctly observe (Pet. 4) that the petition for a writ of certiorari filed in *Motorcity* posed the same question. On January 21, 1997, this Court granted the petition in *Motorcity*, vacated the judgment, and remanded that case for further consideration in light of *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997). See *Hess* v. *FDIC*, No. 96-106 (Jan. 21, 1997).

The Court held in *Atherton* that state law governs the standard of liability applicable to officers and directors of federally chartered financial institutions, and that the gross-negligence cause of action authorized in FIRREA for suits by the FDIC as receiver did not supplant the FDIC-Receiver's right to assert an institution's claims for simple negligence to the extent that such claims are authorized by state law. In our view, nothing in that decision cast doubt on the continued validity of the *D'Oench* doctrine or suggested that *D'Oench* was supplanted by FIRREA. To the extent, however, that the Court believed it appropriate in the wake of *Atherton* to remand the decision in *Motorcity* for further consideration, we see no reason why this case should be treated differently.

A remand will also permit consideration of the impact on this case of a statement of policy adopted by the FDIC effective February 4, 1997. See Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, against Unrecorded Agreements or Assignments or Arrangements of a Depository Institution Prior to Receivership, 62 Fed. Reg. 5984, reproduced at App., *infra*, 1a-25a. The statement of policy sets forth the FDIC's conclusion that

FIRREA could not have displaced the federal common law doctrine announced in *D'Oench* for agreements entered into prior to August 9, 1989—the effective date of FIRREA—because the relevant statutory provisions (12 U.S.C. 1821(d)(9)(A) and 1823(e) (as amended by FIRREA)) cannot be applied retroactively under *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). App., *infra*, 8a. For agreements entered into after the effective date of FIRREA, it announces that, as a matter of policy, the FDIC will henceforth rely solely on the protections afforded by Sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A), and not on the common-law doctrine. App., *infra*, 8a.

Counts VII through XV of the complaint allege that the Banks entered into various oral contracts with petitioners before September 19, 1991, the day the FDIC was appointed as receiver. Pet. App. 58a-77a. A remand will permit the lower courts to determine the dates of the alleged agreements. To the extent that an agreement was entered into before the enactment of FIRREA, *D'Oench* and Section 1823 (as it existed pre-FIRREA) may apply;[1] to the extent that an agreement was entered into after the enact-

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[1] Petitioners expressly disclaim any reliance on the argument, advanced by the petitioners in *Motorcity*, that *D'Oench* was supplanted in 1950, when Section 1823(e) was first enacted. Pet. 7 n.7. Although petitioners suggest (Pet. 7) that Sections 1823(e) (as amended by FIRREA) and 1821(d)(9) apply—and supplant *D'Oench*—with respect to all claims arising in circumstances where the FDIC was appointed as receiver after FIRREA's effective date, because those provisions govern the effectiveness of agreements made with federally insured depository institutions, it is the date of the agreement at issue, not the date of the receivership, that matters for purposes of retroactivity.

ment of FIRREA, the FDIC-Receiver will, in accordance with the statement of policy, rely solely on the protections afforded by the Act.[2]

2. Even if the issue raised by petitioners otherwise merited certiorari, this case would be an inappropriate vehicle for decision. As owner of 100% of the Banks' stock, the SBC estate has a residual claim on the assets of the receivership. It now appears that there may be substantial assets remaining in the receivership after all other remaining claims are resolved. Accordingly, it is likely that petitioners will receive the funds they seek from the receivership irrespective of whether they prevail on their restitution and damages claims.

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[2] A remand will also permit the FDIC to review whether invocation of the protections of *D'Oench* and its statutory counterparts in this case is consistent with the FDIC's current Guidelines for Use of *D'Oench* and Statutory Provisions, which are attached as an addendum to the statement of policy. See App., *infra*, 9a-25a.

CONCLUSION

The petition should be granted, the judgment vacated, and the case remanded for further consideration in light of *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997), and the statement of policy respecting the application of *D'Oench* and its statutory counterparts adopted by the FDIC effective February 4, 1997.

Respectfully submitted.

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FEBRUARY 1997

APPENDIX

[62 Fed. Reg. 5984]

FEDERAL DEPOSIT INSURANCE CORPORATION

STATEMENT OF POLICY REGARDING FEDERAL COMMON LAW AND STATUTORY PROVISIONS PROTECTING FDIC, AS RECEIVER OR CORPORATE LIQUIDATOR, AGAINST UNRECORDED AGREEMENTS OR ARRANGEMENTS OF A DEPOSITORY INSTITUTION PRIOR TO RECEIVERSHIP

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Statement.

SUMMARY: The FDIC has adopted a statement of policy which sets forth when the FDIC will assert the federal common-law doctrine enunciated by the Supreme Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and when the FDIC will assert the statutory protections set forth in 12 U.S.C. 1821(d)(9)(A) and 1823(e).

EFFECTIVE DATE: February 4, 1997.

FOR FURTHER INFORMATION CONTACT: Charlotte Kaplow, Counsel (202-736-0248), Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429.

INTRODUCTION

The protection of the FDIC against unrecorded agreements or arrangements between a federally-insured depository institution (institution) and third parties is among the most important, long-standing, and powerful protections afforded the FDIC acting in

either its corporate liquidator capacity (FDIC/Corporate) or in its capacity as a receiver for a failed institution (FDIC/Receiver). This statement of policy is intended to inform persons doing business with an institution of the circumstances in which: 1) the statutory provisions (12 U.S.C. 1821(d)(9)(A), 1823(e)); and 2) the rule enunciated by the Supreme Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), will be asserted by the FDIC to bar certain agreements or arrangements entered into with the institution prior to receivership. Published as an addendum are "Guidelines For Use of *D'Oench* and Statutory Provisions" (Guidelines), which are discretionary and evolving by nature but nevertheless will serve to moderate the circumstances in which the FDIC will exercise these protections.

BACKGROUND

More than fifty years ago, the Supreme Court in *D'Oench* first recognized a federal policy of protecting FDIC/Corporate from unrecorded schemes or arrangements that would tend to mislead banking authorities. The Court articulated a rule of law prohibiting a party who had lent himself or herself to such a scheme or arrangement from asserting against the FDIC an unrecorded agreement. This rule of law, as it subsequently has been applied by the courts, is referred to as the "*D'Oench* doctrine".

In 1950, Congress enacted section 13(e), codified at 12 U.S.C. 1823(e) (section 1823(e)), as part of the Federal Deposit Insurance Act of 1950, ch. 967, §2[13](e), 64 Stat. 889 (81st Cong., 2d Sess. 1950). The strict approval and recording requirements of section 1823(e) supplemented the protection afforded by the *D'Oench* doctrine. In 1982, this section was reenacted

by Congress as part of the Garn-St. Germain Depository Institution Act of 1982, Pub. L. 97-320, § 113(m), 96 Stat. 1474. Both before and after 1982 the federal courts of appeals and federal district courts consistently construed section 1823(e) and the *D'Oench* doctrine in tandem.

In August 1989, as part of the Financial Institution Reform, Recovery and Enforcement Act (FIRREA), Pub. L. 101-73, 103 Stat. 183, Congress expanded section 1823(e) to cover defenses raised against the FDIC in its receivership capacity, the newly created Resolution Trust Corporation (in its corporate and receivership capacities) and bridge banks. In relevant part, section 1823(e) now provides:

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. 1823(e).

In addition, FIRREA added a new provision, section 11(d)(9)(A) (codified at 12 U.S.C. 1821(d)(9)(A) (section 1821(d)(9)(A)), which states, in relevant part, that "any agreement which does not meet the requirements set forth in section 1823(e) . . . shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC in its corporate capacity]."

In the FDIC's view, Congress intended that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the *D'Oench* doctrine. Accordingly, subject to the Guidelines,[1] these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the *D'Oench* doctrine.

More specifically, the statutory definition of the scope of agreements to which section 1823(e) applies—*i.e.*, those agreements "which tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it" (section 1823(e))—is *not* a "requirement" that section 1823(e) imposes on those agreements, which if not "met" renders section 1821(d)(9) inapplicable. There is no reason to suppose that Congress intended the scope of section 1821(d)(9)(A) to be coextensive with that of section 1823(e).

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[1] The Guidelines have been in effect since late 1994.

Section 1823(e) applies only with respect to agreements that pertain to assets held by the FDIC because the function of that section is to bar certain defenses to the FDIC's collection on such assets. Section 1821(d)(9)(A)'s function, in contrast, is to bar certain affirmative claims against the FDIC. It does so in order to affect primary conduct by providing an incentive for parties contracting with institutions to document their transactions thoroughly. That in turn: 1) allows federal and state bank examiners to rely on an institution's records in evaluating its worth; and 2) ensures mature consideration of unusual banking transactions by senior bank or thrift officials and prevents the fraudulent insertion of new terms when an institution appears headed for failure. *Cf. Langley v. FDIC*, 484 U.S. 86, 91-92 (1987).

In interpreting the meaning of "agreement" in section 1823(e) prior to its amendment in 1989, the Supreme Court in *Langley* held that it would disserve the policies recognized in *D'Oench* to interpret section 1823(e) in a more restricted manner than *D'Oench* itself: "We can safely assume that Congress did not mean 'agreement' in § 1823(e) to be interpreted so much more narrowly than its permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes." *Langley*, 484 U.S. at 92-93. In the same way, it would disserve the policies recognized in *D'Oench* and *Langley* to interpret section 1821(d)(9)(A) more narrowly than *D'Oench* has been applied in so-called no-asset cases.[2]

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[2] Two courts of appeals have applied section 1821(d)(9)(A) in a more constricted manner. *See John v. RTC*, 39 F.3d 773, 776 (7th Cir. 1994); and *Thigpen v. Sparks*, 983 F.2d 644 (5th Cir. 1993). Both of these cases involved pre-FIRREA facts

Nevertheless, as reflected in the Guidelines, the FDIC, as a matter of policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of section 1823(e). To that end, the FDIC will continue to assert the protections of the *D'Oench* doctrine and FIRREA (sections 1821(d)(9)(A), 1823(e)) only in accordance with the Guidelines.

The FDIC has also determined, after careful consideration, that sections 1823(e) (as amended by FIRREA) and 1821(d)(9)(A) cannot be applied retroactively to alleged agreements or arrangements entered into before the enactment of FIRREA on August 9, 1989. Following the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the courts of appeals that have addressed the issue have concluded that sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the transactions at issue occurred before FIRREA's enactment.[3]

No provision within FIRREA addresses the temporal reach of section 1821(d)(9) or section 1823(e)(as amended by FIRREA). If the courts were to apply those provisions to agreements made before the statute was enacted, that would alter the rights possessed

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and, consequently, as discussed *infra*, sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) were inapplicable. Moreover, in any future case involving similar post-FIRREA facts, any decision to raise the statutory protections would have to be authorized pursuant to the Guidelines, which were not in use at the time these cases were litigated.

[3] *See Oklahoma Radio Assocs. v. FDIC*, 987 F.2d 685, 695-96, *motion to vacate denied*, 3 F.3d 1436 (10th Cir. 1993); *Murphy v. FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994)(*en banc*) (noting FDIC's concession in that regard).

by the parties to such agreements.[4] Under the principles articulated by the Supreme Court in *Landgraf*, Congress must therefore be presumed to have intended for those provisions to apply only with respect to agreements made after the enactment of FIRREA.[5] Thus, because the statutory provisions establish "a categorical recording scheme" (*see Langley*, 484 U.S. at 95) and *D'Oench* is an equitable doctrine (*id.* 93-95), sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) cannot be applied retroactively.

Accordingly, the statement of policy announces that the FDIC will assert the *D'Oench* doctrine for pre-FIRREA claims to the extent section 1823(e) (as it existed prior to FIRREA) is inapplicable but the claim nevertheless runs afoul of the *D'Oench* doctrine. For claims that relate to agreements or arrangements entered into after the effective date of FIRREA, the FDIC will apply only sections 1823(e)

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[4] Before FIRREA, a borrower could assert an affirmative claim against the FDIC or FSLIC, or a defense against FDIC/Receiver or the FSLIC, based on a written agreement that failed to meet the contemporaneous-execution, approval, and recording requirements of section 1823(e), so long as the borrower had not lent himself to an arrangement or scheme likelyto mislead bank examiners. *D'Oench*, 315 U.S. at 460.

[5] The retroactivity of FIRREA, however, is *not* determined on an all-or-nothing basis. There is no "reason to think that all the diverse provisions of the [statute] must be treated uniformly for" purposes of the retroactivity analysis. *Landgraf v. USI Film Prods.*, 511 U.S. at 280, 114 S. Ct. at 1505. Moreover, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270, 114 S. Ct. at 1499.

(as amended by FIRREA) and section 1821(d)(9)(A) to bar claims not entered into in accordance with the enumerated requirements of section 1823(e) (as amended by FIRREA). In either case, these protections will be asserted only in keeping with the Guidelines.

FDIC STATEMENT OF POLICY

1. Because sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA) do not apply to agreements entered into before the effective date of FIRREA (August 9, 1989), such agreements are governed by pre-FIRREA law, including section 1823(e) and the *D'Oench* doctrine.

2. Agreements made after the enactment of FIRREA are governed by sections 1821(d)(9)(A) and 1823(e) (as amended by FIRREA).

3. This statement of policy does not supersede the FDIC's Statement of Policy Regarding Treatment of Security Interests After Appointment of the FDIC as Conservator or Receiver of March 23, 1993 (58 FR 16833).

By order of the FDIC Board of Directors.

Dated at Washington, D.C., this day of , 1997.

FEDERAL DEPOSIT INSURANCE CORPORATION

Jerry L. Langley
Executive Secretary

(Seal)

ADDENDUM

FDIC GUIDELINES FOR USE OF *D'OENCH* AND STATUTORY PROVISIONS

1. Purpose. To set forth guidelines for the use of the *D'Oench* doctrine and in 12 U.S.C. 1821(d)(9)(A), 1823(e) (statutory provisions).

2. Scope. This directive applies to all Service Centers and Consolidated Offices, to all future Servicers and, to the extent feasible, to all current Servicers.

3. Responsibility. It is the responsibility of the FDIC Regional Directors of the Division of Resolutions and Receiverships (DRR) and Regional Counsel of the Legal Division (Legal) to ensure compliance with applicable directives by all personnel in their respective service centers.

4. Background.

a. D'Oench Doctrine

In an effort to protect the federal deposit insurance funds and the innocent depositors and creditors of insured financial institutions (institution(s)), the Supreme Court in the case of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) adopted what is commonly known as the *D'Oench* doctrine. This legal doctrine provides that a party who lends himself or herself to a scheme or arrangement that would tend to mislead the banking authorities cannot assert defenses and/or claims based on that scheme or arrangement.

b. Sections 1821(d)(9)(A) and 1823(e)

In 1950, Congress supplemented the *D'Oench* doctrine with 12 U.S.C. 1823(e) which bars any agreement which "tends to diminish or defeat the interest of the [FDIC] in any asset" unless the agreement satisfies all four of the following requirements: (1) it is in writing; (2) it was executed by the depository institution and any person claiming an adverse interest under the agreement contemporaneously with the acquisition of the asset; (3) it was approved by the board of directors of the institution or its loan committee as reflected in the minutes of the board or committee; and (4) it has been continuously an official record of the institution.

In FIRREA, Congress added 12 U.S.C. 1821(d)(9)(A) which protects the FDIC against all claims which do not meet the enumerated requirements of section 1823(e).

c. Policy Considerations

The *D'Oench* doctrine and the statutory provisions embody a public policy designed to protect diligent creditors and innocent depositors from bearing the losses that would result if claims and defenses based on undocumented agreements could be enforced against a failed institution. The requirement that any arrangement or agreement with a failed institution must be in writing allows banking regulators to conduct effective evaluations of open institutions and the FDIC to accurately and quickly complete resolution transactions for failed institutions. This requirement also places the burden of any losses from an undocumented or "secret" arrangement or agree-

ment on the parties to the transaction, who are in the best position to prevent any loss.

Although the *D'Oench* doctrine and the statutory provisions generally promote essential public policy goals, overly aggressive application of the specific requirement of these legal doctrines could lead to inequitable and inconsistent results in particular cases. In order to ameliorate this possibility, the FDIC has undertaken development of these guidelines and procedures to promote the exercise of sound discretion in the application of *D'Oench* or the statutory provisions.

5. Guidelines.

These guidelines are intended to aid in the review of matters where the assertion of *D'Oench* or the statutory provisions is being considered. The examples given are intended to give clear direction as to when particular issues must be referred. In particular, if the use of *D'Oench* or the statutory provisions is proposed in a DRR-Operations matter within the categories set forth below, the matter and recommendation must be referred to the Associate Director-Operations for approval through the procedures contained in section 6.

In the great majority of cases, however, it is anticipated that no resort to Washington should be necessary. It is only in the categories of cases highlighted in the guidelines that Washington approval must be obtained.

a. Pre-closing Vendors

D'Oench or the statutory provisions *shall not* be used as a defense against claims by vendors who have

supplied goods and/or services to failed institution pre-closing when there is clear evidence that the goods/services were received. In such case, *D'Oench* or the statutory provisions shall not be asserted whether or not there are written records in the institutions's files confirming a contract for the goods and/or services.

This does not mean that *D'Oench* or the statutory provisions may never be asserted against a vendor, but only that each claim must be examined carefully on its facts. When there is no evidence that goods or services were received by the failed institution or in other appropriate circumstances, the defenses may be asserted after approval by Washington.

Examples Requiring Washington Approval:

1. Landscaping service filed claim for planting trees around the institution's parking lot. There is no contract for planting trees in the books and records of the institution, but there are trees around the parking lot and no record of any payment. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. A contingency fee attorney is unable to produce any contingency fee agreement, but there is evidence in the files that this attorney has been paid for his collection work for the past 20 years and his name appears on the court records for collection matters for which he has not been paid. In this example also, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

3. Contractor has construction contract with institution to renovate an property owned by the institution. At the time the institution fails, the contractor has completed 90% of the contract and is owed about 50% of the contract price. Here too, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

b. Diligent Party

D'Oench or the statutory provisions may not be asserted without Washington approval where the borrower or claimant took all reasonable steps to document and record the agreement or understanding with the institution and there is no evidence that the borrower or claimant participated in some activity that could likely result in deception of banking regulators, examiners, or the FDIC regarding the assets or liabilities of the institution. In particular, Washington approval is required before *D'Oench* or the statutory provisions may be asserted where the agreement is not contained in the institution's records, but where the borrower or claimant can establish by clear and convincing evidence that the agreement was properly executed by the depository institution through an officer authorized by the board of directors to execute such agreements, as reflected in the minutes of the board. Cases involving "insiders" of the depository institution require particularly careful review because of the greater opportunities of such parties to manipulate the inclusion of "agreements" within the institution's records.

Further, where it is clear that a borrower or claimant has been diligent in insisting on a written document in an apparently arms-length transaction,

and had no control over the section 1823(e) requirement that the transaction be reflected in the Board of Directors' or Loan Committee minutes, assertion of the statutory provisions solely because the transaction is not reflected in those minutes may not be appropriate. In such cases, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

Examples Requiring Washington Approval:

1. Plaintiff sells a large parcel of land to the borrower of the failed institution and the property description in the failed institution's Deed of Trust mistakenly includes both the parcel intended to be sold and a parcel of property not included in the sale. Prior to the appointment of the receiver, the institution agrees orally to amend the Deed of Trust, and indeed sends a letter to the title company asking for the amendment. However, there is nothing in the books and records of the institution to indicate the mistake. The institution fails and the Deed of Trust has never been amended. The borrower defaults and the FDIC attempted to foreclose on both parcels. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. A limited partnership applies for refinancing. A commitment letter is issued by the institution to fund a non-recourse permanent loan which requires additional security of $ 1 million from a non-partner. The Board of Directors minutes reflects that approval is for a nonrecourse loan, however, the final loan documents, including the

note, do not contain the nonrecourse provisions. The institution fails, the partnership defaults and it is determined that the collateral plus the additional collateral is approximately $ 3 million less than the balance of the loan. In a suit by the FDIC for the deficiency, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

3. A borrower completes payment on a loan, and he has cancelled checks evidencing that his loan has been paid off. The institution's records, however, do not document that the final payment has been tendered. The institution fails and the FDIC seeks to enforce the note. Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

However, if it is clear that the borrower or claimant participated in some fraudulent or other activity which could have resulted in deception of banking regulators or examiners, then *D'Oench* or the statutory provisions may be asserted without prior approval from Washington.

Examples Not Requiring Washington Approval:

1. Borrower signs a note with several blanks including the amount of the loan. An officer of the institution fills in the amount of the loan as $ 40,000. Bank fails, loan is in default, the FDIC sues to collect $ 40,000 and the borrower claims that he or she only borrowed $ 20,000. There is nothing in the institution's books and records to indicate the $ 20,000 amount, and, in fact, the institution's books and records evidence dis-

bursement of $40,000. *D'Oench* or the statutory provisions may be asserted.

2. Guarantor, an officer of the borrower corporation, signs a guaranty for the entire amount of a loan to the corporation. At the time of the institution's failure, the loan is in default and the corporation is in Chapter 7 bankruptcy. FDIC files suit against the guarantor for the entire amount of the loan. The guarantor claims that he has an agreement with the institution that he is only liable for the first $ 25,000. There is no record in the institution's files of such an agreement. Again, *D'Oench* or the statutory provisions may be asserted.

Where the specific facts of a case raise any question as to whether *D'Oench* or the statutory provisions should be asserted, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

c. Integral Document

If there are documents in the books and records of the institution which indicate an agreement under the terms asserted by the claimant or borrower, the use of *D'Oench* or the statutory provisions must be carefully evaluated. Particular care must be taken before challenging a claim or defense solely because it fails to comply with the 1823(e) requirement that the agreement be reflected in the minutes of the Board of Directors or Loan Committee. While any number of cases have held that the terms of the agreement must be ascertainable on the face of the document, in some circumstances it may be appropriate to consider all of

the failed institution's books and records in determining the agreement, not just an individual document. Where the records of the institution provide satisfactory evidence of an agreement, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

Examples Requiring Washington Approval:

1. Note in failed institution's file is for one year term on its face. However, the loan application, which is in the loan file, is for five years renewable at one year intervals. The borrower also produces a letter from an officer of the institution confirming that the loan would be renewed on a sixty month basis with a series of one year notes. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. Debtor executes two notes with the proviso that there is no personal liability to the debtor beyond the collateral pledged. When the notes become due they are rolled over and consolidated into one note which recited that it is a renewal and extension of the original notes but does not contain the express disclaimer of personal liability. All three notes are contained together in one loan file. Here, all of the notes should be considered as part of the institution's records. In this example also, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

d. No Asset/Transactions Not Recorded in Ordinary Course of Business

The use of *D'Oench* or the statutory provisions should be limited in most circumstances to loan transactions and other similar ordinary banking transactions. If the ordinary banking transaction is not related to specific current or former assets, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions in such cases. The application of *D'Oench* or the statutory provisions also should be carefully considered before it is asserted in opposition to a tort claim, such as negligence, misrepresentation or tortious interference with business relationships, where the claim is unrelated to a loan or ordinary banking transaction or to a transaction creating or designed to create an asset. Washington approval must be obtained before asserting *D'Oench* or the statutory provisions in such cases.

Examples Requiring Washington Approval:

1. Three years before failure the institution sells one of its subsidiaries. The institution warrants that the subsidiary has been in "continuous and uninterrupted status of good standing" through the date of sale. The buyer in turn attempts to sell the subsidiary and discovers that the subsidiary's charter has been briefly forfeited. The prospective buyer refuses to go through with the sale and the original buyer sues the institution for breach of warranty. FDIC is appointed receiver. This transaction does not involve a lending or other banking financial relationship between the institution

and the buyer. In addition, the subsidiary is not an asset on the books of the institution at the time of the receivership. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. In the case described above in the diligent party section, where the property description in the failed institution's Deed of Trust mistakenly includes a parcel not included in the sale, the parcel at issue is not an actual asset of the failed institution and the assertion of *D'Oench* or the statutory provisions is not be appropriate. Here too, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

However, if a claim arises out of an asset which was involved in a normal banking transaction, such as a loan, *D'Oench* or the statutory provisions would be properly asserted against such a claim despite the fact that the asset no longer exists. For example, collection on the asset does not preclude the use of *D'Oench* or the statutory provisions in response to claims by the former debtor related to the transaction creating the asset.

Example Not Requiring Washington Approval:

1. A borrower obtains a loan from an institution, secured by inventory and with an agreement that allows the institution to audit the business. The business fails, the institution sells the remaining inventory, and applies the proceeds of the sale to the business's debt. Borrower sues the institution for breach of oral agreements,

breach of fiduciary duty, and negligence in performance of audits of the business. Borrower then pays off remaining amount of loan and continues the lawsuit. The institution subsequently fails. Despite borrower's argument that there is no asset involved since the debt has been paid, assertion of *D'Oench* or the statutory provisions would be appropriate.

e. Bilateral Obligations

The facts must be examined closely in matters where the agreement which the FDIC is attempting to enforce contains obligations on both the borrower or claimant and the failed institution and the borrower or claimant is asserting that the institution breached the agreement. If the failed institution's obligation is clear on the face of the agreement and there are documents supporting the claimed breach which are outside the books and records of the institution, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

f. Statutory Defenses

The appropriateness of using *D'Oench* or the statutory provisions to counter statutory defenses should be evaluated on a case by case basis. Although many such defenses may be based on an agreement that is not fully reflected in the books and records of the institution, a careful analysis should be made before asserting *D'Oench* or the statutory provisions. In such cases, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

The clearest examples of situations where assertion of *D'Oench* or the statutory provisions may be

appropriate occur where the opposing party is relying on a statutory defense based upon some misrepresentation or omission by the failed institution. Examples of this type of statute are unfair trade practice statutes.

On the other hand, application of *D'Oench* or the statutory provisions may not be appropriate to oppose claims based on mechanics lien statutes or statutes granting other recorded property rights. The fact that all elements of those liens may not be reflected in the books and records of the institution should not control the application of *D'Oench* or the statutory provisions.

In analyzing the propriety of asserting the *D'Oench* or the statutory provisions, at least the following three general factors should be considered in preparation for seeking approval from Washington:

* To what extent is the purpose of the statute regulatory, rather than remedial? If the statute simply imposes regulatory or mandatory requirements for a transaction, such as a filing requirement or maximum fee for services, assertion of *D'Oench* or the statutory provisions is unlikely to be successful.

* To what extent is the application of the statute premised upon facts that are not reflected in the books and records of the institution? If the state statute requires the existence and/or maintenance of certain facts, but those facts are not recorded in the institution's records, then *D'Oench* or the statutory provisions may be applicable.

* To what extent do the facts involve circumstances where the opposing party failed to take reasonable steps to document some necessary requirement or participated in some scheme or arrangement that would tend to mislead the banking authorities.

Examples Requiring Washington Approval:

1. A priority dispute arises involving a mechanic's lien against property on which the FDIC is attempting to foreclose. An attempt to persuade a court that the mechanic's lien is a form of secret agreement under *D'Oench*, which, if given priority over the interests of the FDIC, will tend to diminish or defeat the value of the asset may not be appropriate. In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

2. State law requires insurance companies doing business in the state to deposit funds with the Commissioner of Insurance. Further, the law provides that the deposit cannot be levied upon by creditors or claimants of the insurance company. An insurance company purchases a certificate of deposit from an institution and assigns it to the Commissioner. At the same time a document is executed entitled "Requisition to the Bank" which states that the institution would not release the CD funds without authorization of the Commissioner. Subsequently the insurance company borrows money from the institution. After the loan goes into default, the institution does not roll the CD over, but rather credits the proceeds to the loan

account. The institution then fails and the Commissioner files a proof of claim with the FDIC seeking payment on the CD. The FDIC may not defend the suit by claiming that the assignment documents did not meet the requirements of section 1823(e). In this example, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

3. The FDIC attempts to collect on a note which the failed institution acquired from a mortgage broker. The note is at a 15% interest rate and the mortgage broker charged six and one half points. State law provides that interest shall be no more than 13% and that no more than one point may be charged. The FDIC may not defend the borrower's counterclaim of a usurious loan by asserting *D'Oench* or the statutory provisions. Here too, Washington approval must be obtained before asserting *D'Oench* or the statutory provisions.

g. Section 1823(e)'s Contemporaneous Requirement

This requirement of section 1823(e) may not be asserted to invalidate a good faith workout or loan modification agreement where the sole issue is whether the contemporaneous requirement of section 1823(e) is met. Where there is an agreement which otherwise satisfies the remaining requirements of the statute, but was not executed contemporaneously with the acquisition of the asset, in most circumstances the statutory provisions should not be asserted. This applies only to workouts or loan modifications done by the failed institution prior to

receivership. The assertion of the section 1823(e) contemporaneous requirement should be considered principally where the facts demonstrate that the workout or restructure was entered into in bad faith and in anticipation of institution failure.

Washington approval must be obtained before asserting *D'Oench* or the statutory provisions in these cases.

6. Procedures To Obtain Washington Approval.

DRR Operations: When facts involving the possible assertion of *D'Oench* or the statutory provisions arise, Legal should be consulted. When the assertion of *D'Oench* or statutory provisions requires Washington approval, as outlined above, prior approval must be received from the Deputy Director-Operations or his designee in Washington in all such cases. Such approval must be obtained by preparation of a memorandum identifying the facts of the case forwarded through Legal Division procedures to the Deputy Director-Operations or his designee.

DRR Asset Management: When facts involving the possible assertion of *D'Oench* or the statutory provisions arise, Legal should be consulted. When the assertion of *D'Oench* or the statutory provisions requires Washington approval, as outlined above, Legal Division procedures should be followed for referral to Washington. Washington Legal will consult with Washington DRR where appropriate.

Legal: Each attorney must carefully review the facts of each instance where the assertion of *D'Oench* or the statutory provisions is being considered under revised Litigation Procedure 3 (LP 3). All cases requiring consultation or approval within these Guidelines and/or PS must be referred to Washington pursuant to LP3 procedures.

These Guidelines are intended only to improve the FDIC's review and management of utilization of *D'Oench* or the statutory provisions. The Guidelines do not create any right or benefit, substantive or procedural, that is enforceable at law, in equity, or otherwise by any party against the FDIC, its officers, employees, or agents, or any other person. The Guidelines shall not be construed to create any right to judicial review, settlement, or any other right involving compliance with its terms.

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No. 96-939

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., as Chapter 7 Trustee of the Estate of Southeast Banking Corporation, SOUTHEAST PROPERTIES, INC., et al.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Southeast Bank, N.A. and Southeast Bank of West Florida;

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, and STATE OF FLORIDA DEPARTMENT OF BANKING AND FINANCE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY MEMORANDUM

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6 pp

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

The petitioners agree with the respondents' position that it is appropriate to grant the petition, vacate the judgment of the court of appeals, and remand this case for further consideration in light of *Atherton v. FDIC*, 117 S.Ct. 666 (1977). Nonetheless, the petitioners strongly disagree with the import of the FDIC's newly-minted position before the Court, which only partially concedes that FIRREA[1] has supplanted the *D'Oench*[2] doctrine. The FDIC joins its shift in stance to posturing that its development of a new administrative policy regarding FIRREA's application, published on February 4, 1997, has nothing to do with *Atherton*. The FDIC also opines that, regardless of its merits, this case is "an inappropriate vehicle for decision," because "substantial assets remaining in the receivership"[3] *now* apparently will fund the petitioners' claims.

In adopting FIRREA in 1989, Congress created 12 U.S.C. § 1821(d)(9)(A)—a provision that barred claims against the FDIC as receiver that were based upon pre-receivership agreements, unless those claims met the amended requirements of 12 U.S.C. § 1823(e)(1). The FDIC now concedes that FIRREA preempts the *D'Oench* doctrine. It urges, however, through a February 4 policy statement, that FIRREA's preemption does not apply to proceedings where the receiver was appointed after

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[1] *I.e.*, Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

[2] *I.e.*, *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942)

[3] Brief for the FDIC, p.6.

FIRREA's effective date, unless the agreements were entered *before* FIRREA's effective date. The FDIC's effort to salvage remnants of *D'Oench* is at direct odds with the law in two circuits that have looked to the date of *receivership* to determine the applicability of FIRREA. *See, e.g., FDIC v. Barton*, 96 F.3d 128 (CA5 1996) (To determine FIRREA's applicability, "courts must look to the law in effect at the time of appointment."); *accord FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225 (CA10 1993).

The FDIC cites *Oklahoma Radio Associates. v. FDIC*, 987 F.2d 685, 695-96 (CA10 1993), *motion to vacate denied*, 3 F.3d 1436 (1993); and *Murphy v. FDIC*, 38 F.3d 1490, 1501 (CA9 1994) (*en banc*), to argue that "the courts that have addressed the issue have concluded that sections 1821(d)(9) and 1823(e) (as amended by FIRREA) do not apply in cases where the *transactions* at issue occurred before FIRREA's enactment." (Brief for the FDIC, App., p. 6a n.3 (emphasis added)). Neither case holds that the date of receivership is not the correct date to determine FIRREA's applicability. In both cases, the receivership had begun before FIRREA. In *Murphy*, the FDIC had *conceded* that FIRREA did not apply. In *Oklahoma Radio*, the court cited legislative history indicating that FIRREA was not to apply to pre-existing *receiverships*[4] and rejected the FDIC's argument that

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[4] Shortly before passage of the bill, Rep. Ortiz made the following comments:

> Mr. Speaker, I seek to clarify the intent and effect of the prospective application of the proposed bill. I understand that this bill would redefine and augment the powers of the Federal Deposit Insurance Corporation when that Corporation serves as a receiver for a failed financial institution. The powers set forth in this bill are, in many respects, new, and there is no intent that such powers be applied to receiverships that have been established prior to the enactment of this bill.

(continued ...)

FIRREA should apply to the appeal, which was pending at FIRREA's effective date. The FDIC's reliance on these decisions to support its contentions highlights the absence of a foundation for its February 4 policy statement. Unfortunately, this dearth of support for its policy may also signal the FDIC's disregard for the law as it stands today, by force of several decisions of the courts of appeals.

The petitioners also dispute the FDIC's argument that (i) section 1823(e)'s limitation to agreements that "tend[] to diminish or defeat the interest of the [FDIC] in any asset acquired by it," is not a limitation on section 1821(d)(9)(A)'s ambit; and (ii) "[n]evertheless. . . the FDIC, as a matter of [discretionary] policy, will not seek to bar claims which by their very nature do not lend themselves to the enumerated requirements of section 1823(e)." (Brief for the FDIC, App., p. 6a). Section 1823(e)(1) *defines* the contours of section 1821(d)(9)(A), and the "asset" restrictions on section 1823(e)(1) do restrict 1821(d)(9)(A). *See* Pet. 11 n.10 (citing *Langley v. FDIC*, 484 U.S. 86, 93 (1987), and *Murphy v. FDIC*, 61 F.3d 34, 38 (CA D.C. 1995)). The FDIC has no discretion to bar claims under section 1821(d)(9)(a) that fall outside of section 1823(e).

The courts of appeals have confirmed that FIRREA's plain terms do not extend it to ordinary, non-banking transactions. *John v. RTC*, 39 F.3d 773, 776 (CA7 1994); *Thigpen v. Sparks*, 983 F.2d 644, 647 (CA5 1993). *But see* Brief for the FDIC, App., p. 5a n.2 (appended policy statement attempting to distinguish *John* and *Thigpen* on basis that FIRREA should not have been applied under FDIC's proposed retroactivity analysis). One of the critical reasons why *D'Oench*'s judicial expansion does not comport with FIRREA is because courts have applied *D'Oench* outside the context of banking transactions. This is another reason why FIRREA has

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(... continued)
987 F.2d at 696 n.7 (quoting 135 Cong. Rec. H5003 (daily ed. August 1, 1989)).

preempted the *D'Oench* doctrine in the wake of *Atherton's* explanation. *But see* Brief for the FDIC, App., p. 5a (policy statement citing pre-FIRREA *Langley* decision for proposition that FIRREA cannot be construed more narrowly than *D'Oench*). The FDIC's policy statement simply misses the mark, and the point of *Atherton*; the FDIC is trying to stamp its executive fiat on an amalgamation of FIRREA and *D'Oench*. At best, its statement reflects a selective obfuscation of case precedents, rather than a sincere recognition of the accurate import of the existing law.

It is small wonder that petitioners should find little solace in the FDIC's long delayed admission that the funds in its coffers "likely" belong to the petitioners. Its statement reflects a stubborn determination to dispute this matter to unjustified lengths, despite this halfhearted concession.

The Court may be inclined to avoid the certain waste of judicial resources the FDIC's new positions invite, and resolve the scope of FIRREA's impact on *D'Oench*. Alternatively, the Court may grant the petition, vacate the judgment below, and remand for further consideration in light of *Atherton*.

Respectfully submitted,

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